Supreme Court, U.S.
FILED

011708 MAY 16 2002

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IN THE

Supreme Court of the United States

MCKESSON HBOC, INC., et al.,
Conditional Cross-Petitioners
v.
ISLAMIC REPUBLIC OF IRAN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Conditional Cross-Petition for a Writ of Certiorari

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May 16, 2002

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QUESTIONS PRESENTED BY THE CONDITIONAL CROSS-PETITION

1. Whether the court of appeals erred in reversing summary judgment against Iran on the issue of liability, and remanding the case for trial after 20 years of litigation, even though the court made no finding that a reasonable trier of fact could find in favor of Iran, and even though the record evidence would not support any such finding.

2. Whether McKesson should have been awarded compound prejudgment interest, rather than simple interest, to make McKesson whole for the expropriation of its investment by Iran more than 20 years ago.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

1. Conditional cross-petitioners, who were appellees and cross-appellants in the court of appeals, are McKesson HBOC, Inc., (formerly known as McKesson Corporation, and before that as Foremost-McKesson, Inc.), a Delaware corporation, and three wholly-owned subsidiaries, Foremost-Tehran, Inc., Foremost Shir, Inc., and Foremost Iran, Inc. (collectively, "McKesson").

2. The Overseas Private Investment Corporation ("OPIC"), an agency of the United States, also was an appellee and cross-appellant in the court of appeals.

3. The Islamic Republic of Iran ("Iran"), a foreign state, was the appellant/cross-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, McKesson HBOC, Inc. states that it is a publicly-owned company. It has no parent and there is no publicly-held company that owns 10 percent or more of McKesson's stock.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

McKesson respectfully submits this conditional cross-petition, requesting that, if the Court grants Iran's petition in No. 01-1521, the Court also grant review with regard to the two additional questions presented here.

OPINIONS BELOW

The opinion of the court of appeals is reported at 271 F.3d 1101 and is reproduced in the appendix to Iran's petition ("PA __") at 1a. The opinion of the district court granting McKesson's motion for partial summary judgment on liability is reproduced at PA 88a. The opinion of the district court denying Iran's second motion for summary judgment and first motion for reconsideration is reproduced in the appendix to this conditional cross-petition ("CA __") at CA 23a. The opinion of the district court denying Iran's third motion for summary judgment and second motion for reconsideration is reproduced at CA 20a. The opinion of the district court declining to include compound prejudgment interest as an element of damages for Iran's expropriation of McKesson's investment is reported at 116 F. Supp.2d 13 and is reproduced at PA 27a, with the discussion of prejudgment interest beginning at PA 77a. The opinion of the district court denying McKesson's motion for reconsideration of the compound interest issue also is reported at 116 F. Supp.2d 13, and is reproduced at CA 5a.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2001. The parties' timely petitions for

rehearing and rehearing *en banc* were denied on January 11, 2002. PA 20a and CA 1a, 3a. Iran's petition for a writ of certiorari was filed on April 11, 2002, and docketed on April 16, 2002. Under this Court's Rule 12.5, this conditional cross-petition is filed within 30 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTERNATIONAL AGREEMENT INVOLVED

The relevant provision of the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed at Tehran on August 15, 1955, and entered into force on June 16, 1957, TIAS 3853, 8 U.S.T. 899 ("Treaty of Amity" or "Treaty") is as follows:

> Article IV.2 Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

STATEMENT OF THE CASE

Many of the background facts and much of the procedural history relevant to the issues raised by this cross-petition are set forth in McKesson's brief in opposition ("Opp.") to Iran's petition. *See* Opp. at 1-8. The discussion below focuses on the specific facts and procedural history relating to the questions presented here.

In January 1982, McKesson filed this action in the United States District Court for the District of Columbia against the Islamic Republic of Iran ("Iran"), several agencies or instrumentalities of Iran that were shareholders in Pak Dairy, and Pak Dairy itself. The complaint alleged that Iran, acting through the co-defendant agencies and instrumentalities, illegally divested McKesson of its equity interest in Pak Dairy. PA 161a. Under Executive Order No. 12,294, 46 Fed. Reg. 14,111 (1981), the litigation was stayed while McKesson presented its claims to the Iran-United States Claims Tribunal ("Claims Tribunal") in The Hague.

In the course of proceedings before the Claims Tribunal, counsel for Pak Dairy argued that it had no obligation to pay McKesson its dividends because McKesson had not physically "come to the company" in Tehran to collect its dividends, in accordance with what Pak claimed was the "custom and practice" in Iran. L 182-L 184.[1/] The Tribunal was not persuaded, and ruled in April 1986 that the Dairy's deliberate cutoff of dividends to McKesson, starting in 1979, was done "with the object of discriminating against [McKesson]." L 205-L 206. It thus awarded McKesson the unpaid dividends declared by Pak Dairy in 1979 and 1980, before the Tribunal's January 1981 jurisdictional cut-off date. L 214.

McKesson revived this lawsuit in April 1988 by filing a motion for partial summary judgment against Iran as to liability, alleging that McKesson's equity interest in Pak Dairy had been the subject of a "creeping expropriation" by Iran that was complete after January 1981. PA 4a, 98a.

1/ "L __" refers to McKesson's Lodging in this Court, which consists of documents from the joint appendix in the court of appeals, the appendix to McKesson's petition for rehearing in the court of appeals, and the district court record.

Eight years later, Iran raised its "come to the company" defense for the first time in this litigation, recasting it this time as a requirement – either of Iranian corporate law or of Pak Dairy itself – rather than merely a custom or practice. The district court reviewed the record and determined that Iran's defense was unsubstantiated by any credible evidence. *See* 1997 WL 361177 (June 23, 1997) (PA 110a-112a). The district court accordingly granted summary judgment in favor of McKesson as to Iran's liability for expropriating McKesson's investment in Pak Dairy. *Id.*, PA 123a.

Iran twice moved for reconsideration, or in the alternative for summary judgment, arguing that its affidavits and legal opinions were sufficient to establish its "come to the company" defense. *See* CA 20a-28a. Despite its "repeated efforts" and "voluminous filings," however, Iran never offered "a single piece of contemporaneous evidence that establishes that Pak Dairy's board of directors ever officially adopted a 'come to the company' requirement." CA 26a. It was undisputed, moreover, that "no Iranian statute or other legal authority mandat[es] the 'come to the company' practice," and Iran's expert did "not cite[] any such authority in his four affidavits." CA 21a. The district court also held, "based on the entire record in this case, including the opinion of the Claims Tribunal, it . . . would have been futile for McKesson to attempt to comply with the alleged 'come to the company' requirement." CA 22a. The district court therefore adhered to its decision to grant summary judgment to McKesson on the issue of Iran's liability. CA 22a, 28a.

In May 2000, after a four-week trial on damages, the district court awarded $20 million to McKesson and OPIC for the expropriation of McKesson's equity investment in Pak Dairy, plus unpaid dividends declared by Pak Dairy in 1981 and 1982. PA 27a. In calculating McKesson's damages, the court recognized that McKesson was entitled to prejudgment interest as an element of just compensation for

its expropriated property. The court held, however, that customary international law permitted only simple (as opposed to compound) prejudgment interest. PA 77a, 80a-81a. In denying McKesson's motion for reconsideration on this point, the court explained at length why, in its view, it lacked discretion to award compound interest. CA 6a-17a. At the very end of its opinion, the court stated that "even if customary international law authorizes an award of compound interest at the discretion of the awarding body, this Court finds the almost uniform practice of awarding only simple interest is a relevant and compelling consideration in the exercise of that discretion." CA 17a.

Iran appealed on numerous grounds, and McKesson cross-appealed on the denial of compound prejudgment interest. The court of appeals affirmed the district court in most respects, but reversed the award of summary judgment as to Iran's liability. PA 19a. The court held that Iran had made a "credible showing" that the Dairy had adopted a requirement that its shareholders physically "come to the company" in Tehran to collect their dividends. PA 12a-14a. The court based this conclusion entirely on two statements by Pak Dairy's chief accountant, Alireza Dadyar. In the first, which appeared in an affidavit submitted by Iran in support of its opposition to McKesson's partial summary judgment motion, Dadyar asserted that "dividends are paid to shareholders by means of a cheque, and the shareholders must come to Pak Dairy to receive the cheque." L 255. In the second, made in an affidavit submitted with Iran's motion for reconsideration, Dadyar speculated that this policy was "the mode of payment chosen by Pak Dairy, either by its General Meeting [of shareholders] or [by its Board of Directors] . . . [s]ince long ago, in particular in 1981 and 1982 and up to the present." L 300.

Iran submitted no corporate documents to support Dadyar's conclusory statement that Pak Dairy had adopted a "come to the company" requirement. The court of appeals recognized this deficiency, but held that his statement was sufficient to overcome summary judgment because, in the court of appeals' view, McKesson had adduced "no evidence to the contrary." PA 13a-14a. The court ignored substantial record evidence contradicting the Dadyar affidavits, and failed to take into account inconsistencies between Dadyar's affidavits and the affidavit of Pak's Managing Director, as well as internal inconsistencies in Dadyar's affidavits themselves. The Court did not address the district court's finding that Iran controlled Pak Dairy and had access to its records, or the fact that Iran had been afforded numerous opportunities over many years to present whatever evidence was available to it.

The court also held that if Iran is given the benefit of a "reasonable inference," which allegedly can be drawn from a telex that Pak Dairy sent to McKesson in November 1981 referring to "Pak's readiness for taking proper measures . . . [a]s regards the payment of [McKesson's] dividend," there is a genuine issue as to whether it would have been futile for McKesson to have attempted to collect its dividends from Pak by sending someone to Tehran for that purpose after the Iranian Revolution. PA 14a-15a. In so holding, the court ignored evidence establishing the futility, in post-Revolutionary Iran, of McKesson's attempting to collect its dividends in Iran. The court also overlooked the fact that a McKesson representative did appear in person at Pak Dairy in March 1981 to request McKesson's dividends, but to no avail.

Finally, although the court of appeals agreed with McKesson "that contemporary international law does not, as the district court seems to have thought, require simple interest," it held that the district court's abrupt reference to

discretion at the end of its opinion denying McKesson's motion for reconsideration was sufficient to withstand review. Specifically, the court rejected McKesson's arguments that (1) the district court should have applied federal common law principles, under which compound interest is the norm, and (2) that the proper exercise of discretion required the district court to consider whether compound interest is warranted under the facts and circumstances of this particular case in order to make McKesson whole, and that its failure to do so constituted an abuse of discretion. PA 19a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

If the Court grants Iran's petition, it should also grant this conditional cross-petition to review the court of appeals' rulings on liability and compound interest. Review of the questions presented by Iran will necessitate review of the same record evidence that bears on the district court's grant of summary judgment as to liability. Accordingly, if the Court were to grant Iran's petition, review of the summary judgment issue presented here would not substantially expand the scope of the Court's review. In addition, the court of appeals departed from this Court's well-established guidelines for appellate review of summary judgment rulings, including (a) the requirement that the court of appeals must consider the entire record before the district court, viewed through the prism of the substantive evidentiary burden applicable at trial, (b) the rule that the nonmoving party cannot create a genuine issue of fact sufficient to survive summary judgment by submitting an affidavit that contradicts prior affidavits of the same party, absent an explanation sufficient to permit a reasonable fact finder to rule in its favor, and (c) the more general requirement that summary judgment not be reversed based on an alleged issue of fact unless the reviewing court is

satisfied that on remand a reasonable fact-finder could enter judgment in favor of the non-moving party. The court below remanded the case for trial without any indication that it considered these issues. After more than 20 years of litigation, the district court's summary judgment ruling should not have been overturned unless the court of appeals had a clear record basis to believe that a reasonable trier of fact could find in Iran's favor at trial. The record contains no such basis.

With respect to prejudgment interest, the courts below should have applied the federal common law rule, under which compound prejudgment interest is the norm, so as to make McKesson whole for the long delay in obtaining compensation. Although the court of appeals confirmed that the district court was wrong in concluding that it was legally precluded from awarding compound interest, the court nevertheless affirmed on the ground that the district court properly exercised its discretion at the end of its ruling on reconsideration. But that result conflicts with this Court's repeated admonition that discretionary choices must be based on sound legal principles, as well as the particular facts and circumstances of the case at hand. Here, the district judge exercised his discretion entirely on the basis of his mistaken view of the practice of other courts and arbitral tribunals, in cases that involved considerations that are neither relevant nor appropriate to the case presented here.

I. THE COURT OF APPEALS VIOLATED WELL-ESTABLISHED PRINCIPLES GOVERNING REVIEW OF SUMMARY JUDGMENT AWARDS BY FAILING TO CONSIDER ALL OF THE PERTINENT RECORD EVIDENCE, FAILING TO ACCOUNT FOR IRAN'S EVIDENTIARY BURDEN, AND FAILING TO DETERMINE WHETHER A REASONABLE TRIER OF FACT COULD FIND FOR IRAN BASED ON ALL OF THE EVIDENCE.

Iran's "come to the company" defense blossomed very late in the course of this protracted litigation. It was first presented by counsel for Pak Dairy, in the course of proceedings before the Claims Tribunal, as a matter of "custom and practice." L 182 - L 184. The defense was unsuccessful. L 205-L 206. In the district court, Iran litigated the case for fourteen years before reviving its custom and practice defense. Without any evidentiary support, it recast the defense as a purported requirement under Iranian corporate law and, later, as a requirement allegedly adopted by Pak Dairy's board of directors. The district judge, who presided over the case from 1988 onward and was intimately familiar with the record, properly concluded that Iran's defense was negated by the undisputed facts and law, and thus presented no obstacle to summary judgment.

In substituting its own judgment for the district court's, the court of appeals committed a number of serious legal errors. First, the court disregarded relevant evidence and therefore reached an erroneous conclusion regarding the inferences that permissibly could be drawn from the evidence on which Iran relies. Second, the court ignored the quantum of evidence necessary to support a reversal of summary judgment where, as here, the nonmoving party bears the burden of proving its defense. Correction of these

errors is warranted, should the Court decide to grant Iran's petition, to reaffirm the Court's summary judgment jurisprudence and to spare McKesson, whose claims have been pending since 1982, the additional cost and delay of a liability trial that is manifestly unnecessary.

A. The Court of Appeals Violated Well-Established Summary Judgment Principles in Reversing the Summary Judgment Award.

Relying entirely on the two unsupported Dadyar affidavits, the court of appeals overruled the district court's finding that Iran failed to raise a genuine issue as to whether Pak Dairy adopted a "come to the company" requirement. PA 12a-14a. Although the court acknowledged case law holding that a party cannot avoid summary judgment by relying on unsupported affidavits, the court declined to follow that rule, explaining that, in this case, "McKesson has submitted no evidence" to contradict the unsupported affidavits. PA 13a. That assertion is wrong, and betrays a fundamental lack of familiarity with the record. In fact, the record is replete with evidence that not only contradicts Iran's affidavits but establishes conclusively that Pak Dairy never adopted any "come to the company" requirement. *See infra* at 13-23.

The court committed the same error in holding that a November 1981 telex from Pak Dairy to McKesson expressing Pak's "readiness for taking proper measures . . . [a]s regards the payment of [McKesson's] dividend" was sufficient by itself to create a genuine issue as to whether it would have been futile for McKesson to "come to the company" and claim its dividends. The evidence before the district court, which the court of appeals again ignored, established the context of Iran's telex and demonstrated that in fact, the "proper measures" to which Iran referred were settlement ***negotiations*** in Vienna, not payment in Tehran.

See infra at 22-23 & n.12. Moreover, other evidence in the district court record – including documents establishing that just a few months before November 1981 McKesson's representative actually had "come to the company" in Tehran and demanded payment of McKesson's past-due dividends – negates any inference favorable to Iran that a reasonable fact-finder possibly could draw from the telex on which the court of appeals relied. *See infra* at 21-22.

This Court has made clear that, when reviewing a district court's award of summary judgment, a court of appeals must consider the entire record before the district court. *See, e.g., Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The important and salutary purposes served by Rule 56, often recognized by this Court, cannot be realized if courts of appeals are free to reverse summary judgment based on an incomplete consideration of the entire record, as the court plainly did in this case. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Similarly, this Court has emphasized that an issue of fact may only be considered "genuine," and therefore capable of precluding summary judgment, if the evidence relied upon by the party opposing summary judgment "is such that a reasonable [fact-finder] could return a verdict" in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Cox v. Kentucky Dep't of Trans.*, 53 F.3d 146, 150 (6th Cir. 1995). Thus, in reviewing the award of summary judgment, the question for the court of appeals was whether the district court reasonably could have found for Iran on the record before it. *Matsushita*, 475 U.S. at 587; *Elwell v. University Hosps. Home Care Servs.*, 276 F.3d 832, 837 (6th Cir. 2002); *Lawshe v. Simpson*, 16 F.3d 1475, 1478 (7th Cir. 1994); *Pyramid Securities, Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1116 (D.C. Cir. 1991); *see also Anderson*, 477 U.S. at 252 ("[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be

insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]"). In this case, however, there is no indication that the court of appeals ever considered, in light of the entire record before the district court, whether Iran's unsupported affidavits and single telex could have supported a judgment in Iran's favor at trial. *See* PA 11a-15a.

This Court also has held that, in ruling on a motion for summary judgment, the court "must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254; *see also Celotex*, 477 U.S. at 323 (moving party entitled to summary judgment when nonmoving party fails to make sufficient showing on element of case as to which it has burden of proof at trial); *Johns Hopkins Univ. v. Cellpro, Inc.*, 152 F.3d 1342, 1359-60 (Fed. Cir. 1998) (relying on substantive evidentiary burden in affirming summary judgment for plaintiff on issue as to which defendant bore burden of proof at trial) (citing *Anderson*); *In re Agricultural Research & Tech. Group, Inc.*, 916 F.2d 528, 540 (9th Cir. 1990) (same). Here, once again, there is no indication that the court of appeals gave any weight to the fact that, at trial, Iran would bear the burden of establishing the elements of its "come to the company" defense. *See* PA 11a-15a; *see, e.g.*, *Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) ("the burden of producing evidence in support of a defense is, of course, normally on the defendant"). On the contrary, review of the relevant evidence set forth below, in comparison with the evidence relied on by the court of appeals, demonstrates that the court could not have reversed the award of summary judgment without disregarding the parties' relative evidentiary burdens.

B. The Court of Appeals Overlooked Important Evidence that Justified the District Court's Summary Judgment Award.

1. The Court's Belief That McKesson Submitted No Evidence Contrary To Dadyar's Affidavits Was Clearly Erroneous.

The court of appeals' statement that McKesson submitted no evidence to counter Dadyar's "come to the company" testimony overlooks key evidence in the record.

First, Leonard Patterson, who since 1976 has been responsible for McKesson's corporate and legal affairs relating to Pak Dairy, testified by affidavit from personal knowledge that

> at no time was [McKesson] aware of a legal requirement that shareholders of Pak Dairy must send a representative to the company's premises in order to collect its dividends and shareholder communications . . . . If there was [such a requirement], neither Pak Dairy nor anyone else ever so apprised [McKesson].[2/]

This testimony is corroborated by contemporaneous evidence: a June 5, 1980 telex from McKesson to Pak Dairy stating that McKesson was unaware of any legal basis for

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2/ Fourth Affidavit of Leonard M. Patterson, Jr. (Sept. 9, 1997) ("Patterson Aff. IV") (appended to Plaintiffs' Opposition to Iran's Second Motion for Summary Judgment or, in the Alternative, for Reconsideration) at ¶ 3 (L 19 – L 20).

Pak's denial of its written demand for payment of its dividend.[3/]

Second, Frank Fisher, who served as Pak Dairy's Managing Director from 1964 to 1979, submitted an affidavit in 1983 describing the Dairy's process for paying dividends to foreign shareholders during his tenure. That process involved no "come to the company" procedure.[4/]

Third, on cross-examination by Iran at the trial on damages, Patterson testified that prior to the cut-off of dividends by Pak's board of directors, McKesson routinely received its dividends in San Francisco through normal banking channels within a few weeks after the dividends were declared by the Pak board.[5/] There was no trial testimony that supported Iran's "come to the company" defense.

Fourth, Pak Dairy's Articles of Association, which contain

3/ See Third Affidavit of Leonard M. Patterson (May 6, 1996, 1996) ("Patterson Aff. III") (L 243) and Exh. 8 (copy of June 5, 1980 telex) (L 121).

4/ Appendix to Plaintiffs' Motion for Partial Summary Judgment, Exh. 2 (Affidavit of Frank Fisher) ("Fisher Aff.") at ¶ 25 (L 33). At an early stage of the case, after Mr. Fisher's death, the Fischer affidavit was ruled inadmissible on hearsay grounds. Subsequently, however, Iran itself relied on the affidavit, calling it "incontrovertibl[e]" evidence. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Renewed Motion for Partial Summary Judgment Against Defendant the Islamic Republic of Iran (May 13, 1996) at 23 n.29 and Exh. 6 (Excerpts from Iran's Appellate Briefs) (L 354 - L 361). Iran thus waived any objection to the affidavit.

5/ See Trial Transcript (1/20/00) at 56:8-16 (L 42). In determining whether there remains any genuine issue of material fact that warrants a trial, this Court should look to the entire record on appeal, including the trial transcript. That is especially so where the relevant testimony was elicited by Iran itself on cross-examination.

the Dairy's binding rules for the payment of dividends to shareholders, do not include a "come to the company" requirement. L 1 - L 18. The absence of any such provision in the Articles is persuasive evidence that no such requirement was ever adopted by the company.

Fifth, the record includes minutes of numerous Pak Dairy shareholders' meetings and board of directors' meetings between 1979 and 1982, many of which discuss the Pak board's withholding of dividends to McKesson. Not one of those meeting minutes contains so much as a hint that Pak Dairy ever required its shareholders to come to the company for their dividends, or that the Dairy was withholding payment of McKesson's dividends based on such a requirement. To the contrary, those corporate documents showed a deliberate decision by the Dairy's board of directors to deny dividends to McKesson for one reason only: McKesson was American and the company had adopted anti-American policies imposed by the Government of Iran.[6/]

Sixth, none of the correspondence between the parties mentions a "come to the company" requirement. In response to McKesson's written demands for payment of its dividends, the Dairy's management simply reported that such payments to Americans or "foreign shareholders" were not allowed. For example, Pak's May 27, 1980 response to a May 21, 1980 demand from McKesson (L 43 – L 44) made no mention of any procedural deficiency in McKesson's written request for its dividends. On the contrary, Pak explained that it would not pay because, "due to decision and instruction of the board of directors, Pak Dairy can not pay

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6/ *See, e.g.*, Minutes of Pak board meeting (April 29, 1981) (L 262, L 266); Patterson Aff. III, Exh. 12 (minutes of annual Pak shareholders' meeting, April 11, 1981), at 2 (L 47).

any sums of money for any reason to foreign shareholders." L 45.[7] McKesson's June 5, 1980 request for an explanation of "the legal basis for this denial" went unanswered. L 243; L 121.

Further, the Tribunal (which included an Iranian arbitrator) ***unanimously*** decided that Pak Dairy's withholding of McKesson's dividends for 1979 and 1980 was "a clear breach of [its] duty" to pay declared dividends to all of its shareholders, notwithstanding Iran's argument that McKesson failed to come to the company for its dividends.[8] Rejection of the purported "come to the company" defense was embodied in the Tribunal's ultimate conclusion that Pak Dairy had breached its duty to pay the dividends, and that Iran was liable for that breach. The court of appeals disregarded both the preclusive effect and the underlying factual basis of the Tribunal's ruling.

The district court's award of summary judgment also was supported by the adverse inference rule. In 1991, McKesson requested that Iran produce Pak records, including all minutes of board and shareholder meetings, communications with shareholders, and documents disclosing payment or non-payment of dividends. L 51, L 55-L 56.[9] But Iran largely failed to comply with McKesson's discovery requests. The responsive documents that Iran did produce contained no hint of a "come to the company" requirement.

7/ *See also* Telex from Pak to McKesson (Sept. 28, 1981) (L 180).

8/ *See* Tribunal Award at 252 (L 209); *see also* Pak Dairy Complementary Statement of Defense filed with the Tribunal (1983) (L 182 - L 184).

9/ Iran, as Pak's principal, presumptively had complete access to its books and records – as did Iran's affiant, the dairy's chief accountant. The district court so held. *See* CA 21a.

See CA 26a-28a. Iran's failure to produce supporting documents mandates the inference that, in fact, Pak never adopted a "come to the company" requirement. *See, e.g., Norfolk & Western R.R. Co. v. Transportation Comm. Int'l Union*, 17 F.3d 696, 702 (4th Cir. 1994) ("The drawing of an adverse inference against a party who fails to come forward with relevant evidence within its control is a reasonable and well-recognized evidentiary rule"); *Alabama Power Co. v. Federal Power Comm'n*, 511 F.2d 383, 391 n.14 (D.C. Cir. 1974) ("It is a familiar rule of evidence that a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffer[ing] an adverse inference from failure to do so.").

2. Inconsistencies In Iran's Own Evidence Establish That the Dadyar Affidavits Do Not Raise a Genuine Issue of Fact.

In 1991, Iran submitted the affidavit of Masoud Pezeshk, Pak Dairy's Managing Director, which states that McKesson, "according to rules and provisions of [Pak Dairy's] Articles of Association, [may] ***refer to or otherwise correspond*** with Pak Dairy . . . in order to receive [its] dividends." L 235 (emphasis added). Five years later, Mr. Dadyar submitted the first of three affidavits in which he outlined a more demanding procedure, contending that shareholders "***must come to Pak Dairy to receive [their dividend].***" L 255 (emphasis added). Although he stated that he "studied" the Pezeshk affidavit, Dadyar made no attempt in his first affidavit to explain the inconsistency between his explanation (which is silent on the option of receiving dividends by correspondence) and that of his Managing Director. Two years later, after McKesson brought this inconsistency to the attention of the district court, Mr. Dadyar submitted a second affidavit. There, he asserted that Pezeshk's testimony

> is not inconsistent with my statement but supplements it. I believe Mr. Pezeshk meant that if [McKesson] could not send a representative to receive the dividends, it could correspond with Pak Dairy informing the latter how it wished to collect its dividends so that the matter could be considered and decided by the company.

L 296. By admitting to the availability of a procedure under which shareholders were entitled to request their dividends by correspondence – ***a procedure that McKesson in fact followed in this case without receiving payment***, *see infra* at 21-22 – Pezeshk's affidavit and Dadyar's second affidavit undercut whatever evidentiary value Dadyar's first affidavit might have had with respect to establishing a genuine issue for trial.

A second key inconsistency involves Dadyar's attempt to explain the source of the alleged "come to the company" rule. He asserts in his several affidavits that the exercise of shareholder rights is governed by Pak Dairy's Articles of Association, and he cites various sections of the Articles to support his statements. L 253 - L 255; L 296 - L 297. Dadyar cites no provision in the Articles that requires shareholders to come to the company to receive their dividends, however. This is not an oversight, because the Articles do not contain such a requirement. PA 110a; L 1 - L 18.

Dadyar offered no explanation, from personal knowledge or otherwise, as to how Pak Dairy could have adopted such a significant requirement governing the payment of dividends to shareholders without incorporating it in the Articles, along with the company's other dividend procedures. When plaintiffs pointed out this defect in Dadyar's testimony, Iran submitted a ***third*** affidavit by him. There, he speculated that the "come to the company" requirement was "chosen by Pak Dairy, either by its General

Meeting [of shareholders] or [by its Board of Directors] pursuant to authority under Article 57 of the Articles of Association" and the Iranian Commercial Code. L 300. Yet, despite his access to Pak Dairy's books and records, Dadyar was unable to present any minutes of meetings, resolutions, or other evidence indicating that Pak Dairy's shareholders or directors had ever exercised such authority and adopted the purported requirement. Nor did he attempt to explain this inability.

What the court of appeals viewed as Dadyar's "first-hand knowledge" of his company's "come to the company requirement" is, on closer scrutiny, nothing more than uncorroborated and self-serving speculation, riddled with inconsistencies with his Managing Director's affidavit, his own subsequent affidavit, and his company's organic documents. As such, Dadyar's affidavits do not have sufficient evidentiary value to withstand summary judgment on liability. *See Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 806-07 (1999) (holding that nonmoving party cannot create a genuine issue of fact sufficient to survive summary judgment by submitting affidavit that contradicts prior affidavit of same party, absent an explanation sufficient to permit a reasonable fact finder to rule in its favor); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1503 (D.C. Cir. 1989) (district court properly granted summary judgment where nonmoving party's affidavits were internally inconsistent and at odds with documentary evidence).

3. Even If Pak Dairy Had a "Come to the Company" Requirement, the Futility of Any Effort by McKesson to Comply With It Is Not Genuinely in Dispute.

Even if there had been a "come to the company" requirement, there is substantial record evidence – none of

which the court of appeals addressed – demonstrating that it would have been futile for McKesson to attempt to comply. L 61 – 80, L 487 – 490. For instance, it is well-known, and the record evidence shows, that intense animosity against Americans was a central precept of the Iranian government and legal system in the years following the Revolution.[10/] As recently as 1992, the Speaker of the Iranian Parliament stated that the possibility of investment by U.S. companies in Iran "does not exist in Iran at all with regard to the attitudes of the people and the leader of the revolution toward the United States." *See* L 94, L 95; *see also* PA 11a ("Iran's post-revolutionary courts cannot provide adequate remedies for U.S. claims"). There is no question that the state of affairs in Iran during the time period relevant to this case, after the Revolution and during and after the American hostages were being held captive, was extremely hostile for American companies like McKesson.

The official Iranian policy of anti-Americanism, implemented through business decisions made in the Dairy's boardroom, drove Pak Dairy to deprive McKesson of the benefits of its shareholding in the company. From late 1979 onward, Pak's board of directors adopted and maintained a policy of refusing to pay any money owed to McKesson for any reason.[11/]

10/ *See, e.g.*, L 88 (report of U.S. State Department warning on January 27, 1981, after Iran's release of American hostages taken at U.S. Embassy in Tehran, against travel by Americans to Iran: "All U.S. citizens should avoid such travel because of the continuing anti-American feeling, . . . and the virulently anti-American stance of the Iranian government.").

11/ In late 1979, Pak's board ceased all payments owed under its contracts with McKesson. *See* Minutes of Pak board meeting (Nov. 15, 1979) (handwritten note by Dr. Ameli, observing that, "[a]s stated in previous meetings, all foreign contracts of the company must be reconsidered, and are not valid in my opinion, and any payment in this connection shall be illegal"), Fisher Aff., Exh. 13 (L 97); Minutes of Pak

Several times, McKesson tried without success to obtain its dividends by sending a written demand, and in one case an Iranian representative, to Pak Dairy. In June 1980, Pak's Managing Director reported to the Pak board concerning McKesson's written request that its dividends be paid, but the board decided that "no payment will be made to the foreigners." L 122 (minutes of board meeting, June 3, 1980) at ¶ 6.

In March 1981, McKesson asked its duly authorized Iranian representative on the Pak board, Gholam Vahdati, to present a formal request for payment of McKesson's dividends at the next Pak Dairy board meeting. L 124. Vahdati personally delivered a written demand at the board meeting held on April 29, 1981. L 262, L 266, L 267. The minutes show that the demand was referred to an Iranian governmental body responsible for "International Claims" for review. *Id.* The dividends were never paid.

The court below read out of context the November 1981 telex from Pak Dairy to McKesson, which referred to "Pak's

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board meeting (Dec. 5, 1979) at ¶ 5 (statement by director Ameli that "under the present circumstances no payment should be made to the foreigners with regards to these contracts until later when the matter is approved by the Board of Directors" (which approval was never given)) (L 102); Minutes of Pak board meeting (March 10, 1980) at 25-26 (statement by Ameli: "because of the existing dispute between Iran and the United States, payment of profits to foreign share holders has to be kept pending for the time being") (L 105 – L 106); Minutes of Pak shareholders' meeting (April 14, 1980) (declaring dividend, but noting "prohibition of payment to foreigners") (L 111); April 1980 letter from Pak Board Chairman Haghshenas to Pak Dairy shareholders (observing that since the Revolution not a cent was paid, in cash or bonus shares, to foreign shareholders) at 1-2 (L 114 – L-115); Telex from Gholam Vahdati (McKesson's representative on the Pak board) to Sabin Phelps of McKesson (Jan. 13, 1981) ("My information from Account Dept. is that local shareholders have indeed received their cash dividends but currently no foreign payments are permitted.") (L 117).

readiness for taking proper measures . . . [a]s regards the payment of [McKesson's] dividend." L 137; *see* PA 14a. That telex was the last in a series of communications, initiated by McKesson three months earlier, which reflect a failed attempt to obtain payments on its claims prior to commencing arbitration at the Tribunal.[12/] It is clear that this telex did not in fact contain any offer to pay dividends. The entire exchange shows that the November 1981 telex was nothing more than a last attempt by Pak Dairy to interest McKesson in returning to Vienna to negotiate a settlement of its claims. That is not a sufficient basis to raise a genuine issue about the futility of McKesson "coming to the company" in Iran. Indeed, just a few months earlier, McKesson's Iranian representative had gone in person to a Pak board meeting and demanded payment of McKesson's

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12/ McKesson's telex of Aug. 26, 1981 (L 125, L 126) set forth McKesson's claims and indicated the claims would be filed with the Tribunal on Oct. 19, 1981 unless the parties reached a settlement before then, and offered to meet in Vienna to negotiate a settlement. Pak Dairy's response on Sept. 16, 1981 (L 127) accepted the invitation to meet "in due time" in Vienna for "negotiation and settlement of the claims." On Sept. 22, 1981, McKesson replied (L 128), proposing to meet with Pak Dairy from Oct. 6-9. Pak replied on Sept. 28 (L 180), stating "you will be shortly notified of the exact date of negotiations." McKesson's telex of Oct. 9 (L 131, L 132) indicates that its representative arrived in Vienna on Oct. 6, notified Pak, and returned to the United States on Oct. 9 without receiving any word from the Dairy. An Oct. 10 telex from Pak (L 133, L 134) proposed to meet McKesson in Vienna from Oct. 15-18 for negotiation. McKesson notified Pak on Oct. 13 that this was insufficient notice and unacceptable. L 135. Then, on Oct. 23, McKesson notified Pak that it was resigning from the Pak board L 136. Pak responded with its Nov. 11, 1981 telex (L 137 – L 138), which is the one on which the court of appeals relied. There (in ¶6) Pak states: "As you know, this company has already expressed its readiness for ***negotiating*** in Vienna, but you have actually refused ***negotiations*** by faking up excuses and you have probably sent the referenced telex in the baseless hope of filing a lawsuit against [Iran]." L 138 (emphasis added). McKesson filed its Statement of Claim with the Tribunal on Nov. 16, 1981.

past-due dividends, to no avail. No reasonable finder of fact could find, on the basis of the November 1981 telex, that it would *not* have been futile for McKesson to attempt to go to Iran to collect its dividends.

The evidence summarized above shows that McKesson was caught up in a process in which the ordinary corporate formalities in Iran no longer protected its interests as a shareholder in Pak Dairy. The Iranian government instrumentalities that brought about this expropriation were expressly carrying out the will of the new government of Iran to cut the flow of funds to Americans. Iran's "come to the company" defense is a fiction, concocted for purposes of litigation and unsupported by any documentary evidence. It is not an appropriate use of scarce judicial resources, nor is it fair, now to require McKesson, on the basis of this record compiled during two decades of litigation, to return to the district court for trial. If this Court is inclined to grant Iran's petition, then it should also grant this cross-petition and determine whether the district court's liability judgment should be reinstated.

II. SIMPLE PREJUDGMENT INTEREST CANNOT MAKE MCKESSON WHOLE, AS THE APPLICABLE LAW REQUIRES.

There is no settled principle of customary international law governing the availability of compound prejudgment interest. PA 17a-18a. Where such a rule is lacking in a case otherwise controlled by international law, federal courts apply federal common law. PA 79a (citing *Forman v. Korean Air Lines Co., Ltd.*, 84 F.3d 446, 450 (D.C. Cir. 1996)); *see also Matter of Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1333 (7th Cir. 1992) (applying federal common law in determining availability of compound interest on claims governed by French law, where parties had failed to suggest a controlling French rule); *Laker Airways, Ltd. v.*

Sabena, Belgian World Airlines, 731 F.2d 909, 950-52 & n.162 (D.C. Cir. 1984) (applying federal common law rule, rather than "interest balancing" approach suggested by defendant, because "there is no evidence that interest balancing represents a rule of international law"). The courts below therefore should have applied federal common law principles in determining whether McKesson was entitled to compound (rather than simple) prejudgment interest in compensation for having been deprived of its property for the past twenty-plus years.[13/]

Although this Court has yet to decide the question, the court of appeals have developed a rule of federal common law that includes a strong presumption in favor of compound prejudgment interest. Indeed, as the Seventh Circuit observed in *Amoco Cadiz*, "compound prejudgment interest is the norm in federal litigation." 954 F.2d at 1332 (citing *West Virginia v. United States*, 479 U.S. 305 (1987); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983); and *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989)). Since 1982, moreover, federal law has required that interest be compounded annually during the period after the court enters judgment, and the rationale for doing so applies equally to the period before judgment is entered. *See* 28 U.S.C. § 1961(b) (amended March 22, 1982, P.L. 97-164); *see also* S. Rep. No. 275 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 40 (using example showing application of compound interest in commenting on the need for prejudgment interest); *Gore, Inc. v. Glickman*, 137 F.3d 863, 868 (5th Cir. 1998) ("[p]rejudgment interest, *like any other interest*, is to compensate for the time value of

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13/ Calculated as of the date of the district court's judgment, the difference between the court's award with 9% simple prejudgment interest ($20,071,159) and an award with 9% compound annual prejudgment interest ($36,391,302) was approximately $16 million.

money.") (emphasis added).

Although district courts are of necessity afforded some discretion in determining whether to depart from the norm and award only simple interest, courts have long recognized that "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975); *United States v. Taylor*, 487 U.S. 326, 336 (1988); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226-27 (1982); *see also Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) ("[t]he exercise of discretion contemplates reasoned decision making on the basis of relevant and appropriate considerations to the task at hand."); *Amoco Cadiz*, 954 F.2d at 1334 ("[d]iscretion is not unbridled; it is exercised under law"). Thus, in reviewing for abuse of discretion, an appellate court should consider whether the district court failed to consider a relevant factor, relied on an improper factor, and gave reasons that do not reasonably support its decision. *Rishell v. Jane Phillips Episcopal Memorial Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996); *Kickapoo Tribe*, 43 F.3d at 1497; *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 423 (1st Cir. 1991).

In this case, the court of appeals' review was deficient in several respects. First, the court neglected to consider whether the district court had failed to address factors relevant to its determination of the compound interest question. The proper exercise of discretion, under federal law principles, requires consideration of what is needed to "make the plaintiff whole" in light of the facts and circumstances of the particular case. *See, e.g. Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993); (reversing district court's refusal to award compound prejudgment interest); *Gorenstein Enters. v. Quality-Care*

U.S.A., Inc., 874 F.2d 431, 437 (7th Cir. 1989); *Dynamics Corp. v. United States*, 766 F.2d 518, 520 (Fed. Cir. 1985) (reversing award of simple interest and remanding for consideration of what just compensation required).

Here, it is clear from the district court's opinions that, to the extent it exercised its discretion at all in rejecting compound interest, it did so only in response to McKesson's motion for reconsideration and even then it did not consider what was required to make McKesson whole in light of the facts of this case. Instead, the district court deferred to decisions reached by courts or arbitrators in other cases. CA 17a. The court of appeals recognized that "federal common-law principles require courts to 'make the plaintiff whole,'" but it nevertheless held that the district court had not abused its discretion by failing to apply those principles here. PA 19a.

Consideration of the facts and circumstances of this case, which should have governed the exercise of discretion below, demonstrates that compound prejudgment interest was the appropriate award. The district court found that Iran's expropriation of McKesson's investment in Pak Dairy began in 1979 and was complete by April 1982. PA 105a-115a. Since then more than twenty years have passed, during which time McKesson has been deprived of its property and Iran has had the unfettered use of it. During that same period, McKesson paid compound interest to the banks from which it borrowed, and realized annual compound returns on its equity averaging more than 9%. L 303 – L 308; *see, e.g.*, *ITT Corp. v. United States*, 17 Cl. Ct. 199, 242 (1989) (taking judicial notice "that compound interest is a market or commercial reality for any corporation that does business in the United States"). Awarding only simple interest therefore penalizes McKesson, by putting it in a worse position than it would have been had Iran not expropriated its property, and rewards Iran with a windfall

for having successfully delayed final judgment. *See, e.g.*, *Amoco Cadiz*, 954 F.2d at 1231-32 (explaining that "[a]n injurer allowed to keep the return on this money has profited by the wrong."). Such a result, if it is allowed to stand, will send a clear message to foreign state litigants that, in U.S. courts, justice delayed is a money-making proposition.

Further guidance in this case is found in the investment protection clause of the Treaty of Amity, Art. IV(2), which requires "prompt payment of just compensation . . . representing the full equivalent of the property taken." This provision should be read in the context of the analogous rule of customary international law that "where property has been expropriated, just compensation must be paid 'at the time of the taking, or within a reasonable time thereafter with interest from the date of taking . . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1986). The district court correctly found that under this rule, McKesson is entitled to prejudgment interest as an element of damages because "[m]oney today is not a full substitute for the same sum that should have been paid [20] years ago." PA 77a. Although the court of appeals found no fault with the district court's reliance on this rationale to support an award of prejudgment interest, it rejected McKesson's argument that the same reasoning ***requires*** compound interest in this case.[14/] PA 17a (the terms "just

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14/ In support of its appeal on the compound interest issue, McKesson submitted the expert opinion of Stephen M. Schwebel, former Judge and President of the International Court of Justice and a leading authority on international law. CA 29a. Judge Schwebel expressed the view that, under the Treaty of Amity, and under customary international law, the court should award compound interest where the taking occurred many years ago, "because an award of only simple interest does not 'represent the full equivalent of the property taken.'" Schwebel Op. ¶9 (citing *Starrett Housing Corp. v. Iran*, 16 Iran-U.S.C.T.R. 112, 251-54 (1987) (Holtzmann, J., concurring) (L 413, L 482 – L 484) (Treaty's

compensation" and "full equivalent" are "far too ambiguous to require awards of compound interest"). In deferring uncritically to the district court's exercise of discretion, such as it was, the court of appeals overlooked the obvious fact that, in this case, after 20 years of delay, an award of only simple interest clearly does not represent the full equivalent of the property taken.

In addition to ignoring the factors that it should have applied, both courts below also focused on an improper one: what the Claims Tribunal and other international courts "almost uniformly" or "invariably" have done with respect to prejudgment interest. PA 19a; CA 17a; *see Dynamics Corp.*, 766 F.2d at 520. The trial court in *Dynamics*, much like the district court here, had refused to award compound prejudgment interest because "traditionally, [reasonable and entire compensation] has always been limited to simple interest." *Id.* The Federal Circuit reversed, holding that the lower court should not have considered "what may have been 'traditional,'" and remanded the case for determination whether compound interest was appropriate in light of the facts and circumstances of the case itself. *Id.*; *see also ITT Corp.*, 17 Cl. Ct. at 239 (the court cannot rely on a "time-honored" practice that has neither been adequately examined or defended in terms of commercial realities). The international arbitration awards upon which the courts below focused shed no light at all on whether and when a federal court applying federal common law principles may or should depart from the norm and award only simple interest. Indeed, the courts' particular reliance on decisions by the Claims Tribunal and Foreign Claims Settlement Commission ("FCSC") is especially inappropriate in light of the unique circumstances, not present here, that shaped their policies

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requirement of "just compensation" mandates an award of compound interest in an expropriation case), & ¶ 24 (CA 34a, 52a).

with respect to prejudgment interest.[15/]

CONCLUSION

If the Court grants Iran's petition for a writ of certiorari, the conditional cross-petition also should be granted.

15/ The Tribunal's practice with respect to interest awards was heavily influenced by two factors. First, all Tribunal awards are payable promptly from a captive fund in The Netherlands, which was considered to be a substantial benefit not ordinarily available to private litigants against a sovereign defendant. Second, from the outset, at the Tribunal, it was recognized that substantial delays in the issuance of final awards were inevitable, without any fault or dilatory tactics by the respondents, due to the extremely large number of cases that had to be heard by only three chambers of arbitrators. *McCullough v. Minister of Post*, 11 Iran-U.S.C.T.R. 3, 30 (1988) (L 387, L 401); George Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, 477 (1996) (JA 1842). This consideration is unique to the Tribunal and clearly has no application in this case, where the substantial delay (at least since 1988, when the district court proceedings resumed) is attributable primarily to Iran's own litigating tactics. The FCSC's congressional mandate – to adjudicate a class of cases in which the claimants are required to share in a fixed and often inadequate fund – gives rise to similar policy considerations for awarding simple interest that, again, are inapplicable here.

Respectfully submitted,

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May 16, 2002

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APPENDIX 1

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 00-7157 **September Term, 2001**
82cv00220

Filed On: January 11, 2002 [650207]

Foremost Tehran, Inc., et al.,
Appellees

v.

Islamic Republic of Iran,
Appellant

Financial Organization for the Expansion of Ownership of Productive Units, et al.,
Appellees

Consolidated with 00-7263

BEFORE: Edwards, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of appellees/cross-appellants' petition for rehearing filed December 17, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Nancy G. Dunn
Deputy Clerk

APPENDIX 2

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 00-7157 **September Term, 2001**
82cv00220

Filed On: January 11, 2002 [650206]

Foremost Tehran, Inc., et al.,
Appellees

v.

Islamic Republic of Iran,
Appellant

Financial Organization for the Expansion of Ownership of Productive Units, et al.,
Appellees

Consolidated with 00-7263

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellees/cross-appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Nancy G. Dunn
Deputy Clerk

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED Sept. 28, 2000
Nancy Mayer Whittington
Clerk
U.S. District Court

McKesson Corporation, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action**
	)	**No. 82-00220**
The Islamic Republic of Iran, et al.,	)	**TAF**
	)	
Defendants.	)	
	)	

MEMORANDUM-OPINION

Presently pending is Plaintiff's motion for reconsideration pursuant to Fed. R. Civ. P. 59(e). Plaintiffs seek reversal of this Court's decision denying them pre-judgement compound interest and awarding only simple interest. For the reasons discussed below, Plaintiffs' motion is denied.

I. Discussion

Rule 59(e) motions "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice" Anyanwutaku v. Moore, 151 F.3d 1053, 1057 (D.C. Cir. 1998) (citation and internal quotations omitted); see also

Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Conversely, a "Rule 59(e) motion is not a second opportunity to present argument upon which the Court has already ruled, nor is it a means to bring before the Court theories or arguments that could have been advanced earlier." WC & AN Miller Companies v. U.S., 173 F.R.D. 1, 3 (D. D. C 1997), aff'd, Hicks v. U.S., 1999 WL 414253 (D.C. Cir. May 17, 1999).

In the Court's Memorandum-Opinion filed May 26, 2000, the Court determined the amount of damages for the expropriation of Plaintiffs' equity interest in the Iranian diary company, the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy") and for their share of Pak Dairy's 1981 and 1982 dividends. See Memorandum-Opinion, Civ. A. No. 82-220 (May 26, 2000). After determining the value of the expropriated interests, the Court concluded that under customary international law, Plaintiffs were entitled to prejudgment interest calculated from the date of taking. Id. at 46-48. However, the Court denied Plaintiffs' request for compound interest. Id. at 50. After reviewing the state of customary international law and finding that the clear majority of international courts have historically awarded only simple interest, the Court concluded that in applying customary international law, it must follow this practice. Id. at 49-50.

Plaintiffs now move for reconsideration based on a recent arbitration decision by the International Centre for Settlement of Investment Disputes ("ICSID"), Compañia del Desarollo de Santa Elena, S.A. v. Republic of Costa Rica (hereinafter "Santa Elena"), ICSID Case No. ARB/91/1

(Washington, D.C. February 17, 2000).[1/] Plaintiffs argue that Santa Elena presents new authority on the availability and propriety of compound interest under international law and that it demonstrates that this Court's view of international law was erroneous.

In Santa Elena, the panel arbitrated a dispute over the correct amount of compensation which Costa Rica owed for property which it had expropriated. After determining the value of the property on the date of the taking, the panel also awarded interest from that date. It further concluded that interest should be calculated on a compound basis. The panel reviewed various sources of international law and found that "[n]o uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case." Id., Pl. Ex. 2 at ¶ 103. The panel concluded that the decision was left to the judgment of the ruling body, "taking into account all of the circumstances of the case at hand and especially considerations of fairness. . . ." Id. The panel then decided that in an expropriation case "where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due him," compound interest was necessary to ensure full compensation. Id. at ¶ 104. Plaintiffs now assert that this ruling demonstrates that they are entitled to compound interest as compensation for the expropriation of their interests in Pak Dairy.

1/ The Court was informed by Plaintiffs that the ICSID intended to publish the decision in its Spring 2000 reports. As of the date of this decision, however, the opinion in Santa Elena is not listed on the ICSID website as having been published. See http://www/worldbank.org/icsid/cases/conclude.html (listing Santa Elena as concluded but not published)

The Court finds that Plaintiffs' motion for reconsideration fails to satisfy the applicable standard for granting such motions. First, Plaintiffs have demonstrated no change in controlling authority. The recent decision of one arbitration panel of the ICSID does not, as Plaintiffs argue, constitute an "authoritative" determination of international law which this Court is bound to follow. Customary international law is a product of "the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis added). The Santa Elena decision thus presents relevant evidence of international law but must still be considered in light of the other evidence available. It thus cannot be "authoritative" in the sense that a controlling decision of law would be. For similar reasons, Santa Elena does not demonstrate that this Court committed clear error in following the practice of the vast majority of international cases and the explicit ruling of the Iran-U.S. Claims Tribunal, for these sources are also valid evidence of international law.

However, even considering the matter de novo, the Court is not persuaded that Santa Elena's view of international law is the correct one. To demonstrate that customary international law provides for compound interest, Santa Elena cites only one such award in the last sixty years, the Aminoil case. See Kuwait v. American Independent Oil Co. (Aminoil), 21 I.L.M. 976 (1982). Whether Aminoil actually awarded compound interest under international law is questionable, because the tribunal in that case had explicit authority to choose from various sources which law to apply on any particular substantive issue and it did not specify what law it relied on in awarding compound interest. Id. at 1000, 1042.

Even ignoring this ambiguity, however, Aminoil, does not support the existence of a customary rule. In determining customary international law, this Court is restricted to a "settled rule of international law" which has commanded the "general assent of civilized nations." The Paquete Habana, 175 U.S. 677, 700 (1900). "The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one." Hamid v. Price Waterhouse, 51 F.3d 1411, 1418 (9th Cir. 1995) (citation and internal quotations omitted). "Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law." Id.

There is no dispute among the available cases or commentators that compound interest has rarely been granted, and when requested has almost always been expressly rejected. See M. Whiteman, III Damages in International Law 1997 (1943) ("Although in rare cases compound interest, or its equivalent, has been granted, tribunals have been almost unanimous in disapproval of its allowance. This is particularly true when the attention of the tribunal has been especially brought to the point.") In light of this almost uniform international jurisprudence rejecting compound interest, one or two cases to the contrary cannot establish the general assent of nations to such awards.

The panel in Santa Elena found additional support for an award of compound interest in the written opinions of two commentators. First, it noted the opinion of the late Professor F. A. Mann that under international law, "compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals." See Mann, F.A., Compound Interest as an Item of Damage, in F.A. Mann, Further Studies in International Law, 385 (1990). However, Dr. Mann apparently viewed international law under a different standard than the "settled rule" standard applicable

here, for he also conceded that Whiteman's contrary view that "compound interest is not allowable" was supported by numerous decisions. Id. at 377-78. While it might be appropriate to draw a customary rule from limited authority where such authority stands alone, it is far more questionable to do so where international tribunals and commentators have repeatedly expressed a contrary conception of the law. Given the majority practice rejecting an award of compound interest, it is difficult to conclude that a rule authorizing compound interest has become settled.

Indeed, Dr. Mann found that even the domestic laws of various "civilized countries" did not provide "unequivocal" evidence of the acceptance of compound interest. In countries such as England, France, Germany, Switzerland and the United States, he found that a law typically "does not authorize (but does not prohibit) the payment of compound interest." Id. at 381. He was therefore left to conclude not that compound interest is already accepted but that it "should be accepted wherever damages are allowed and should . . . be treated as a general principle of law." Id. at 383. He urged courts to "inaugurate 'a new conception of justice in accord with the highest knowledge and truest insight perceptible to the human mind.'" id. (citation omitted).

Even if Dr. Mann's insights reflect a better or more accurate view of compensation, this Court cannot follow them in absence of actual authority under customary international law to do so. As the Supreme Court has indicated, works of learned jurists and commentators "are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." The Paquete Habana, 175 U.S. at 700. Dr. Mann's opinion that a new rule is justified is thus not a persuasive basis for rejecting the established majority rule as the current state of international law.

The panel in Santa Elena cited to another commentator, Professor Gaetano Arangio-Ruiz who as Special Rapporteur of the United Nations International Law Commission on State Responsibility stated: "The Special Rapporteur is therefore inclined to conclude that compound interest should be awarded whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State." II Yearbook of the Int'l Law Commission, Part I, at 30 (1989). However, this opinion also appears to suffer the flaw noted above in connection with Dr. Mann. While Dr. Arangio-Ruiz as commentator may have indicated that compound interest should be awarded, it is undisputed that as an actual jurist of the Iran-U.S. Claims Tribunal, he has repeatedly signed on without any dissent to opinions awarding only simple interest, indicating that his view of what the law should be and what it actually is are not coextensive. See, e.g., Shahin Shaine Ebrahimi v. Government of the Islamic Republic of Iran, Award No. 560-44/46/47-3, ¶ 179 (October 12, 1994) (Westlaw/Int-Iran) (finding liability for expropriation and awarding simple interest from the date of taking).

In sum, this Court finds that Santa Elena and the sources it relies upon are not persuasive evidence of customary international law and that the law as evidenced by the majority of relevant cases and as expressed most recently by the Tribunal is the applicable rule.

Plaintiffs argue that the decisions of the Tribunal which reject compound interest are distinguishable from Santa Elena and the instant case. Plaintiffs assert that the Tribunal based its denial of compound interest not on customary law but on the special features of the Tribunal and the Algiers Accords. Plaintiffs cite McCollough & Co. v. Ministry of Post, Telegraph and Telephone, Award No. 225-89-3 (April 22, 1986), reprinted at 11 Iran-U.S. Cl. Trib. R. 3 (1988). However, Plaintiffs overlook the fact that the Tribunal has explicitly rested in practice of denying

compound interest on international law. See, e.g. R.J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran, Award No. 145-35-3 (August 6, 1984), reprinted at 7 Iran-U.S. Cl. Trib. R. 181, 191 (1986). Conversely, although McCollough did rely on the Algiers Accords and the specific features of the Tribunal in connection with determining an award of interest, it did so in order to determine the rate of interest and the date from which interest was to run, not the method of accumulation. McCollough, ¶ 102, 11 Iran-U.S. Cl. Trib. R. at 30. Indeed, applying McCollough's reasoning to the issue of compound interest leads to a contradiction, for one of the "specific features" of the Tribunal which concerned it was the likelihood that claims would be long delayed before resolution. Id. However, Plaintiffs themselves argue that cases of long delay present a greater, not a lesser justification for compound interest. Thus, had the Tribunal been motivated by concerns over delay, it would have awarded compound interest. The Court concludes that the Tribunal's practice of awarding only simple interest is based not on concern over delay but rather on the Tribunal's understanding of customary international law.[2/]

2/ Plaintiffs have noted that this Court allowed itself to be guided by the practice of the federal courts in determining the appropriate rate of interest but not in determining the method of calculation. This disparity in treatment is directly reflected in the reasoning of McCollough. When addressing whether to grant compound interest, the Tribunal found that "[t]here are few rules within the scope of the subject of international law that are better settled than the one that compound interest is not allowable." R.J. Reynolds Tobacco Co., 7 Iran-U.S. Cl. Trib. R. 181, 191 (quoting M. Whiteman, III Damages in International Law 1997 (1943)). In contrast, when the Tribunal in McCollough considered how to determine an appropriate rate of interest, it expressly relied on the "discretion

(continued).

Plaintiffs also argue, as did the panel in Santa Elena, that the customary practice of awarding only simple interest applies primarily in cases of personal injury or breach of contract and that "[t]he same considerations do not apply to cases relating to the valuation of property or property rights." Santa Elena at ¶ 97. However, Santa Elena failed to provide any evidence that international law reflects this distinction. The only support provided by the panel was a quotation allegedly drawn from the Tribunal decision in Flexi-Van Leasing, Inc. v. Iran which the panel erroneously cited at 9 Iran-U.S. Cl. Trib. R. 206. However, neither Flexi-Van, Decision No. DEC 54-36-1 (Dec. 18, 1986), reprinted at 13 Iran-U.S. Cl. Trib. R. 324 (1988), nor Int'l Technical Products Corp. v. Iran, the case actually reported at 9 Iran-U.S. Cl. Trib. R. 206 (1987), address the issue of compound interest at all. Further, the quotation Santa Elena relied upon, most likely drawn from McCollough, merely states correctly that "occasionally compound interest has been awarded." McCollough & Co., at ¶ 96, 11 Iran-U.S. Cl. Trib. R. at 28. It offers no support for Santa Elena's distinction between property and contract cases.

That distinction is also not supported by the cases which award compound interest or the far more numerous cases which do not. The case most often cited as awarding compound interest is, as noted above, Aminoil. However, the arbitration panel in Aminoil awarded damages for both contract and property claim and then provided for compound interest on damages without making any of the distinctions suggested by Santa Elena.

Conversely, numerous expropriation cases have been reported which award only simple interest or affirmatively reject and award of compound interest. For example, in

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recognised [sic] by international law." McCollough, ¶ 103, 11 Iran-U.S. Cl. Trib. R. at 30.

Norwegian Shipowner's Claims (Norway v. U.S.), 1 R. Int'l Arb. Awards 307 (1922), the United States and Norway submitted to arbitration the claims of Norwegian citizens that the United States had expropriated their vessels. The tribunal awarded the shipowners damages including interest. In awarding interest, the tribunal provided a number of reasons which it found sufficient to justify an award of simple interest:

> the Tribunal has taken into consideration the facts that the United States have had the use and profits of the claimant's property since the requisition of five years ago, and especially that the sums awarded as compensation to the claimants by the American Requisition Claim Committee have not been paid, finally that the United States have had the benefit of the progress payments made by Norwegians with reference to these ships

Id. at 341. However, the tribunal in Norwegian Shipowners expressly held that these considerations were insufficient to justify an award of compound interest. It stated:

> The claimants have asked for compound interest with half-yearly adjustments, but compound interest has not been granted in previous arbitration cases, and the Tribunal is of the opinion that the claimants have not advanced sufficient reasons why an award of compound interest, in this case, should be made.

Id. see also V. Hackworth, Digest of Int'l Law, 736 (1943) (reprinting quotations)[3/]

Further, the jurisprudence of the Iran-U.S. Claims Tribunal is replete with examples of expropriation awards providing only simple interest. Most strikingly, in Starrett Housing Corp. v. Islamic Republic of Iran, Award No. 314-24-1, ¶ 370-71 (August 14, 1987), 16 Iran-U.S. Cl. Trib. R. 112, 234-35 (1988), the majority rejected an award of compound interest despite strong arguments for such an award coming from both the claimants and a concurring opinion by Judge Holtzmann. See id., 16 Iran-U.S. Cl. Trib. R. at 251-54 (Holtzmann, concurring in part and dissenting in part). Starrett thus confirms that the Tribunal rejected compound interest in property as well as contract cases.

The distinction between property and contract claims

3/ The reference in Norwegian Shipowners to "special circumstances" that might justify compound interest has been repeatedly lached onto by those seeking to demonstrate that compound interest is not entirely unavailable. See II Yearbook of the Int'l Law Commission, Part I, at 30 (1989). The difficulty with relying upon this language is not merely that the "special circumstances" are never identified, but that the facts of Norwegian Shipowners establish that the expropriation of a money-earning property is not one of those special circumstances. Thus, it is notable that in British claims in the Spanish Zone of Morocco, (reported at II Yearbook of the Int'l Law Commission, Part 1, at 30 (1989)), the arbitrator also made reference to "particularly strong and quite special arguments need[ed] to be advanced to accept" compound interest, but concluded that "[s]uch arguments do not appear to exist . . . ." These references to special circumstances thus offer little basis for the entitlement to compound interest which Santa Elena found to exist in virtually any expropriation case.

is also absent from the jurisprudence of the Foreign Claims Settlement Commission ("Commission"), a quasi-judicial body of the United States government authorized to adjudicate certain categories of international claims. See 1998 FCSC Ann. Rep. at 4, available at http://www.usdoj.gov/fcsc/annrep98.html; see also 1993 FCSC Ann. Rep. at 6. Historically, the Commission has awarded only simple interest in expropriation claims despite the passage of long periods of time between the taking and the award. See Shanghai Power Co. v. U.S., 4 Cl. Ct. 237, 239 (Cl. Ct. 1983) (noting that Commission awarded simple interest on claim that People's Republic of China had expropriated power company), aff'd, 765 F.2d 159 (Fed. Cir. 1985); Maria A. Stevens, reprinted at 1998 FCSC Ann. Rep. at Exh. II (finding Albania liable for expropriation and awarding simple interest "[i]n accordance with applicable principles of international law and its decisions in previous claims programs"). Of particular note are the Commission's adjudications of claims against Iran. Specifically, in 1990, the Commission was given authority to adjudicate small claims lodged against Iran following the Revolution.[4/] The

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4/ These small claims were initially under the jurisdiction of the Iran-U.S. Claims Tribunal. However, in 1985, Congress passed a law giving the Commission stand-by jurisdiction over these claims pending a global settlement between Iran and the United States. On May 13, 1990, the United States and Iran entered into an agreement which provided for the espousal of all small claims by the United States, extinguishing Iran's liability, in return for which Iran would pay a lump sum of $105 million. Following the agreement, the Commission's jurisdiction to adjudicate these claims became effective. The $105 million was then used to establish a fund for the satisfaction of any awards by the Commission. See Abrahim-Youri v. U.S., 139 F.3d 1462, 1464 (Fed. Cir. 1997) (summarizing history of the Commission's adjudication of Iranian small claims).

Commission's published decisions (available in its Annual Reports to the Congress) indicate that in ruling on these small claims, it uniformly awarded only simple interest, even in claims of expropriation. See, e.g., Darioush, Diana & Daniel Elghanayan, Dec. No. 1083, reprinted at 1993 FCSC Ann. Rep. 11, 18 (awarding damages for expropriation and holding that "[i]n accordance with Tribunal precedent, recognized principles of international law, and its decisions in previous claims programs, the Commission further concludes that the claimants are entitled to interest as part of their awards, amounting to 10 percent simple interest per annum . . .") (emphasis added); Nouriel Aryeh, Samuel Aryeh, Ouriel Aryeh & Emanuel Aryeh, Dec. No. IR-2365; reprinted at 1994 FCSC Ann Rep. 19, 38 (same); Angel Murad, Dec. No. IR-2226, reprinted at 1994 FCSC Ann. Rep. 59, 65 (same). Based on all of these authorities, the Court must reject Santa Elena's asserted distinction between contract and property cases, and conclude that in all cases, customary international law does not provide for compound interest.

Finally, even if customary international law authorizes an award of compound interest at the discretion of the awarding body, this Court finds that the almost uniform practice of awarding only simple interest is a relevant and compelling consideration in the exercise of that discretion. The cases before the Tribunal and this country's own Commission are particularly relevant since both addressed claims of U.S. citizens against Iran for expropriations which occurred more than 10 years previously, claims directly comparable to Plaintiff's own. Both bodies, acting under international law, awarded only simple interest. This Court finds that these cases and the other authorities supporting their practice offer persuasive guidance and accordingly, even with discretion, this Court concludes that simple interest is the appropriate award.

Accordingly, Plaintiffs' motion is denied. An appropriate order will accompany this decision.

Date: September 28, 2000

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED Sept. 28, 2000
Nancy Mayer Whittington
Clerk
U.S. District Court

McKesson Corporation, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action**
	)	**No. 82-00220**
The Islamic Republic of Iran, et al.,	)	**TAF**
	)	
Defendants.	)	
	)	

ORDER

For the reasons discussed in the accompanying Memorandum-Opinion, it is hereby **ORDERED** that Plaintiff's Motion for Reconsideration (505) is DENIED.

Date: September 28, 2000

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED Mar. 17, 1999
Clerk, U.S. District Court
District of Columbia

McKesson Corporation, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action**
	)	**No. 82-0220**
The Islamic Republic of Iran, et al.,	)	**TAF**
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

The Islamic Republic of Iran (Iran) has filed a Third Motion For Summary Judgment, and Second Motion for Reconsideration of this Court's granting of Plaintiffs' Motion for Summary Judgment on the Issue of Liability and denial of Iran's Motion for Summary Judgment. The issue of liability has been decided by the Court's order of June 23, 1997, and reaffirmed by the Court in its January 29, 1998, Memorandum Opinion and Order.

Iran, now for the third time, contends that Iranian law requires McKesson to send a representative to Pak Dairy in Iran in order to collect is dividends.

McKesson states in its opposition that Iran is merely restating contentions that have been twice considered and

overruled by this Court and that it fails to show any reason why the Court should reconsider a judgment it has already considered twice and affirmed. A motion for reconsideration must be based on the discovery of new evidence or on a clear error of fact or law. Iran relies on a fourth affidavit from its legal expert, Dr. Fakhari. Examination of Dr. Fakhari's affidavit reveals that it contains no evidence to show Pak Dairy's Board of Directors ever officially adopted a "come to the company" requirement in accordance with Pak Dairy's Articles of Association. The affidavit contains no references to Iranian law requiring a shareholder to "come to the company" for dividends.

The Court has found that Iran controlled Pak Dairy, that dividends were declared by Pak Dairy for the years in issue, that distribution of dividends to shareholders is obligatory under Pak Dairy's Articles of Association, that Pak Dairy refused to distribute dividends to McKesson, and that Pak Dairy has never rescinded its decision to withhold payments of dividends to McKesson. It is undisputed in this case that there is no Iranian statute or other legal authority mandating the "come to the company" practice, and Dr. Fakhari has not cited any such authority in his four affidavits.

Iran asserts that it has requested Park Dairy to produce any minutes of Pak Dairy's Board of Directors in which a "come to the company" policy was imposed. Iran contends that its failure to produce such evidence to substantiate its claimed "come to the company" requirement should not be held against it since Pak Dairy has been uncooperative in producing documents. However this Court has held that Iran has a principal agent relationship with Pak Dairy and controls Pak Dairy. Therefore the Court gives little credence to Iran's contention. In its 1997 opinion the Court found that it would have been futile for McKesson to send an authorized representative to Tehran to claim its dividends relying in part on the findings of the Claims

Tribunal. In Footnote #3 of its Memorandum Opinion filed on January 29, 1998, the Court stated that it may in fact have overrelied on the Claims Tribunal opinion in reaching a conclusion that it would have been futile for McKesson to attempt to comply with the alleged "come to the company" requirement. However upon further consideration the Court does find that based on the entire record in this case, including the opinion of the Claims Tribunal, it indeed would have been futile for McKesson to attempt to comply with the alleged "come to the company" requirement.

Conclusion

Iran has failed to meet its burden of presenting newly discovered evidence or demonstrating a clear error of law or fact which would justify a reversal of the Court's entry of partial summary judgment in this case. Therefore Iran's Third Motion for Summary Judgment and Second Motion for Reconsideration will be denied.

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

So Ordered: 3-17-99

APPENDIX 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED Jan. 29, 1998
Clerk, U.S. District Court
District of Columbia

McKesson Corporation, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action**
	)	**No. 82-00220**
The Islamic Republic of Iran, et al.,	)	**(TAF)**
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

This matter came before the Court at a hearing on January 8, 1997. Pending before the Court is Iran's second motion for summary judgment or, in the alternative, for reconsideration. After considering the applicable law and the arguments set forth in the parties' memoranda and at the hearing, the Court will deny Iran's motion.[1/]

1/ As a procedural matter, the Court will treat Iran's motion as one for reconsideration. Since the court has already ruled on the precise issue –Iran's liability–on which Iran seeks summary judgment, it is inappropriate to treat Iran's filing as a "second motion for summary judgment." Nonetheless, even if such a motion were appropriate, the Court would deny the motion on the merits, for the reasons set forth in this opinion.

I. Background

At issue in this case is the plaintiffs' ("McKesson") claim that the defendants ("Iran") have expropriated McKesson's interest in the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy"), a dairy located in Iran. On June 23, 1997, the Court granted partial summary judgment in favor of McKesson on the issue of Iran's liability. Applying both customary international law and the Treaty of Amity between the United States and Iran, the Court concluded that, while McKesson still retains formal title to its shares in the dairy, Iran's interference with McKesson's interest in the dairy amounts to an expropriation.[2/] Central to its ruling on Iran's liability was the Court's conclusion that, from 1981 to the present, Iran has wrongfully withheld McKesson's dividends.

The basis for Iran's pending motion is an argument that the Court already considered and rejected when it found Iran liable for expropriating McKesson's interest in Pak Dairy. Specifically, Iran argues that there has been no expropriation because McKesson can get its dividends anytime it wants, if only it will follow the proper procedure, i.e., by sending an authorized representative to Pak Dairy to collect the dividends in person. According to Iran, this procedural requirement is one that the dairy's board of directors has officially adopted and that therefore has the force of a "legal requirement," in the sense that, under Iranian law, McKesson would not be able to maintain a cause of action for the taking of its dividends unless it had first sought payment of the dividends by "coming to the company." Since it is undisputed that McKesson has never attempted to comply with the "come to the company"

2/ Because it found liability on those grounds, the Court did not decide whether Iran is also liable under Iranian law.

requirement, Iran concludes that McKesson cannot show that its dividends have been wrongfully withheld.

The Court's June 23 opinion directly addressed Iran's argument that the dairy has a "come to the company" requirement for collecting dividends. First, the court noted that the dairy's Articles of Association do not specify any particular method for paying or collecting dividends. Instead, Article 57 provides merely that "should the general meeting pass no resolution regarding the mode of payment of dividends, the board of directors may determine the mode of payment." Second, the Court concluded that Iran had at best established that the "come to the company" policy was a custom or practice of the dairy, not a legal requirement. Third, the Court concluded that, even if a "come to the company" requirement existed, it was "undisputed" that McKesson did not know about it. And fourth, the Court concluded that it would have been futile for McKesson to have attempted to comply with any such requirement. In explaining this last point, the Court noted that the Claims Tribunal found that Pak Dairy had "never specifically retracted" a May 27, 1980 telex that stated that the dairy "can not pay any sums of money for any reason to foreign shareholders."[3/]

In support of its request for reconsideration, Iran offers no new factual information. Instead, Iran relies on the following: a clarification of legal arguments it had made in

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3/ In support of its motion for reconsideration, Iran contends that the Court's conclusion on the futility issue was in error. The Court acknowledges that it may in fact have over relied on the Claims Tribunal's opinion in reaching the conclusion that it would have been futile for McKesson to attempt to comply with the alleged "come to the company" requirement. However, since Iran has failed to demonstrate that a legally binding requirement exists, the Court need not resolve the issue of whether it would have been futile for McKesson to "come to the company" to collect its dividends.

support of its earlier summary judgment motion; the third affidavit of its legal expert, Dr. Amir Hossein Fakhari; and the third affidavit of the dairy's head accountant, Alireza Dadyar. In their affidavits, Fakhari and Dadyar basically reaffirm points they made in earlier affidavits, i.e., that the dairy had adopted the dividend-payment procedure described above and that the procedure has the force of a legal requirement.

II. Analysis

Iran has yet to demonstrate that there is a genuine issue of material fact with regard to its expropriation of McKesson's interest in Pak Dairy. Despite its repeated efforts, Iran has not presented evidence that establishes that the dairy's board of directors ever formally adopted the alleged "come to the company" requirement for collecting dividends or that any such requirement, assuming it exists at all, has the force of law. Since the Court remains convinced that there is no justification for the withholding of McKesson's dividends in Pak Dairy, it will not reconsider its decision to grant McKesson partial summary judgment on the issue of liability.

In all of its voluminous filings in this case, Iran has yet to offer a single piece of contemporaneous evidence that establishes that Pak Dairy's board of directors ever officially adopted a "come to the company" requirement. It also has failed to demonstrate that McKesson was properly on notice of such a requirement. Two key documents that Iran cites as establishing these points are in fact of little help to its position. The first of those documents, a November 11, 1981 telex that the dairy sent to McKesson, includes this cryptic reference to the alleged "come to the company" requirement:

> As regards the payment of your dividend, this company has repeatedly announced its readiness for taking proper measures but you have not taken

> appropriate action in this regard. If you really mean to settle this issue, you can introduce your plenipotentiary representative to us so that necessary steps may be taken according to the current regulations.

Obviously, this telex does not spell out any policy, nor does it make any reference to official board action. The other document, a brief Iran filed before the Claims Tribunal on December 6, 1983, is even more unhelpful to Iran's position. In that brief, Iran wrote: "The triple companies [McKesson] never adopted definite arrangements to collect dividends accruing on their shares in Pak Dairy because *the normal routine* in Pak Dairy was that the shareholder used to introduce a representative to collect the checque for the dividend . . . . (Iran's Exhibit 11 at 22-23) (emphasis added). If anything, this passage only lends further support to the Court's conclusion that the alleged "come to the company" requirement is really just a custom or practice. Again, Iran did not support its brief with any documentation demonstrating that the board had officially adopted a binding requirement.

The affidavits Iran has submitted in support of the pending motion are similarly devoid of any documentation to support Iran's contention that the dairy's board of directors ever formally adopted the "come to the company" policy as a binding requirement. In fact, in his most recent affidavit, Mr. Dadyar, the dairy's accountant, states that, "[a]lthough not obligated to do so, Pak Dairy occasionally made exceptions to its requirement that the dividends be collected [according to the "come to the company" requirement]. However, Foremost never formally requested such an exception in 1981 or thereafter and Pak Dairy never made such an exception to the requirement for Foremost." Putting aside the question of whether it is plausible for Iran to claim that McKesson has never asked for an exception to the dairy's "come to the company" policy, Dadyar's

statement falls far short of supporting the proposition that the policy is a formal, binding requirement.

Despite its claims to the contrary, Iran has not offered evidence sufficient to create a genuine issue of material fact with regard to whether it has expropriated McKesson's interest in Pak Dairy. Therefore, the Court will adhere to its decision to grant partial summary judgment in favor of McKesson on the issue of liability.

III. Conclusion

For the reasons given above, it is hereby ORDERED that Iran's second motion for summary judgment or, in the alternative, for reconsideration, is hereby DENIED.

Date: 1/29/98

/s/Thomas A. Flannery
Thomas A. Flannery
United States District Judge

APPENDIX 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

McKESSON HBOC, INC., et al.,	)	
Appellees/	)	
Cross-Appellants	)	
v.	)	**No. 00-7263**
THE ISLAMIC REPUBLIC OF IRAN	)	
Appellants/	)	
Cross-Appellees,	)	
THE FINANCIAL ORGANIZATION FOR THE EXPANSION OF OWNERSHIP OF PRODUCTIVE UNITS, et al.,	)	
Appellees	)	

EXPERT OPINION OF STEPHEN M. SCHWEBEL

May 8, 2001

EXPERT OPINION OF
JUDGE STEPHEN M. SCHWEBEL

1. My name is Stephen M. Schwebel. I have been asked by McKesson HBOC and the Overseas Private Investment Corporation to give an opinion on a question of international law in connection with the above-captioned case. I served as a Judge of the International Court of Justice in The Hague from 1981 to 2000, and as President of that Court from 1997 to 2000. I have been appointed as chairman or arbitrator in twenty-nine international arbitrations, taught international law at Harvard Law School and the School of Advanced International Studies of The Johns Hopkins University, served as a member and Special Rapporteur of the United Nations International Law Commission and as Deputy Legal Adviser of the United States Department of State, and have written three books and some 150 articles in the field of international law. The Chairman of the Administrative Council of the International Centre for the Settlement of Investment Disputes (ICSID) has appointed me a member of the ICSID Panel of Arbitrators and of the Panel of Conciliators for a six-year term expiring in 2006. My qualifications are more fully listed in the attached curriculum vitae.

2. I have been requested to give my opinion on the question of whether, in applying public international law, the determination of the type of interest payable by a State and State-owned or affiliated agencies and companies for expropriation to a foreign investor, who has successfully maintained a claim in a U.S. court against that State and its companies for expropriation, must result in simple prejudgment interest or whether compound interest may, consistently with international law, be awarded.

3. There is no multilateral treaty that governs the issue. Nor is there a treaty in force between the Islamic Republic of Iran, the State in question, and the State of which the foreign investor is a national, the United States of America, which specifically addresses the matter of interest. The Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran of 1956, which the International Court of Justice and the Iran-United States Claims Tribunal have held to be in force, does not expressly refer to awards of interest. It does however provide in Article IV, paragraph 2 that:

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken.

4. The United States District Court for the District of Columbia has held that there was a taking by Iran and its co-defendants of the property of the Plaintiffs, and that compensation shall, in accordance with the Treaty of Amity and customary international law, be paid by the Defendants which "shall represent the full equivalent of the property taken." *Memorandum Opinion of May 26, 2000* at 46-47.

5. The full equivalent of the value of the property taken by the Defendants from the Plaintiffs requires awarding not only damages for the expropriation of the

Plaintiffs' equity interest and their share of dividends, but, as the District Court determined, in applying customary international law, prejudgment interest calculated from the date of taking. However, the Court denied the request of the Plaintiffs for compound interest. Ibid., at 48. "After reviewing the state of customary international law and finding that a clear majority of international courts have historically awarded only simple interest," the Court concluded that "in applying customary international law, it *must* follow this practice" Ibid., at 2; emphasis supplied.

6. In my opinion, the District Court in construing and applying international law to hold that an award of compound interest was impermissible in this case erred on two counts. First, it failed in respect of interest to apply the specification of Article IV, paragraph 2 of the Treaty of Amity requiring that compensation "shall represent the full equivalent of the property taken." Second, it misinterpreted and misapplied the customary international law that it held to be governing. It is my opinion that, under a correct construction and application of the Treaty and of customary international law to this case, compound interest is not only an available remedy but an appropriate and necessary component of the damages to which the Court held that the Plaintiffs are entitled.

I. Application of the Treaty of Amity

7. It is established in international jurisprudence, as reflected in the terms of the Statute of the International Court of Justice (to which Iran and the United States are Parties) that, before resorting to customary international law, a court shall apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States" (Statute of the International Court of Justice, Article 38, paragraph 1 (a). As pointed out by Sir Robert Jennings (former President of the International Court of Justice) and Sir Arthur Watts (formerly The Legal

Adviser of the Foreign and Commonwealth Office of the United Kingdom),"an international court is bound in the first instance to consider any applicable treaty provisions binding upon the parties..."(*Oppenheim's International Law,* Ninth Edition, Volume 1, Peace, 1992, at 25-26.) Where the standard set out in a treaty between the States concerned and the standard found in customary international law differ, the treaty standard governs. "As between the parties, the provisions of a treaty prevail over any inconsistent rule of customary international law..." (*Ibid.,* at 1249.) In applying international law, the District Court should have followed these principles, which are embodied in Section 102 of the *Restatement of the Foreign Relations Law (Third) of the United States.* "Unless the parties evince a contrary intention, a rule established by agreement supersedes for them a prior inconsistent rule of customary international law." *Ibid.* at 27-28, Comment j. The Treaty of Amity is an international convention which establishes the rule, expressly recognized by Iran and the United States, that compensation for property taken by either Party "shall represent the full equivalent of the property taken."

8. It is well known that, as a matter of commercial reality and predominant practice, companies that borrow from banks, as large companies generally do, pay compound interest (see the authorities quoted below). It is equally a matter of commercial reality and predominant practice that debts owed to a company must be repaid with compound interest if the creditor company is to receive "the full equivalent" of the debt. During the period of non-payment, the creditor company will typically have borrowed paying compound interest. If interest on its debts to its creditors is compounded, but interest on debts owed to it carry only simple interest, the company sustains a loss that grows increasingly with the passage of time. As was pointed out in the most recent survey of the subject, published in the *American Journal of International Law:*

> In the modern world of international commerce, almost all financing and investment vehicles involve compound, as opposed to simple, interest. If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest. John Y. Gotanda, "Awarding Interest in International Arbitration," 90 *A.J.I.L.* 40, 61 (1996).

See also, F.A. Mann, "Compound Interest as an Item of Damage in International Law," 21 U.C. Davis L.R. 577 (1988):

> It is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest...many are compelled to borrow from banks and therefore must pay compound interest...on the basis of compelling evidence compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals. (*Ibid.*, at 585, 586.)

9. Applying this reasoning to construe the "just compensation" which is to be promptly paid and which "shall represent the full equivalent of the property taken", pursuant to Article IV, paragraph 2 of the Treaty of Amity, it follows that, if a federal court in the United States is to give effect to the treaty obligations of the Parties to a treaty, one of which is the United States, i.e., the Treaty of Amity, it shall award not simple but compound interest in order to provide "the full equivalent of the property taken..." In my opinion, a U.S. federal court, adjudicating an expropriation

claim based upon this provision of the Treaty of Amity, is bound to award compound interest as part of the compensation for the expropriation held to have occurred in 1982, because an award of only simple interest does not "represent the full equivalent of the property taken."

II. The Standard under Customary International Law

10. Customary international law properly applied to the instant matter also should result in the award of compound interest. The District Court's contrary conclusion, that it *must* award only simple interest, was based on the Court's erroneous finding of a rule of customary international law requiring that result.

11. A rule of customary international law evolves from the practice of States and is reflected in the judgments of courts and tribunals passing upon questions of international law. This practice must come to be viewed by States as giving rise to *opinio juris* of the international community that the practice has attained a constancy and uniformity that sustains the conclusion that it is not mere usage but a matter of legal obligation. In my opinion, the rule of simple interest only, which the District Court held to apply under customary international law, is not the rule at all. To the contrary, it is now the rule that the court or tribunal deciding a claim for damages governed by customary international law should award compound interest where, in the exercise of appropriate discretion, it is warranted.

12. Customary international law is made, and unmade, by practice. A rule of customary international law may, at one time, be settled, but divergent international practice may unsettle it. By way of example, for many years, the three-mile limit of the territorial sea was generally accepted as customary international law. But more expansive seaward claims on the part of an increasing

number of States unsettled what had been regarded as settled, and made it impossible to codify that custom in the great law-of-the-sea conventions concluded in the last fifty years of the Twentieth Century. On the contrary, in reflection of the change in what had been customary international law, Article 3 of the Third United Nations Convention on the Law of the Sea now provides that, "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles..."(United Nations Convention on the Law of the Sea of 10 December 1982.) A State need not exercise that right; it may choose to adhere to a lesser limit, and some States do so adhere. But it may lawfully establish a twelve-mile territorial sea, in clear recognition of the fact that what was generally seen as governing customary international law on the matter in the early decades of the Twentieth Century no longer applies; custom had become unsettled through challenging practice, which latter practice in due course came to be codified as the international law of the matter.

13. The District Court gave considerable weight to a statement 58 years ago by a then Assistant to the Legal Adviser of the United States Department of State, asserting that the disallowance of compound interest was at that time a settled rule of international law. 3 Marjorie M. Whiteman, *Damages in International Law* (1943), at 1997. If that was a settled rule in 1943, however, it has become unsettled since. The practice to which Miss Whiteman referred no longer "is in accord with a constant and uniform usage," if ever it was. Contemporary practice is inconstant and diverse. Some practice, largely routine and sparse in analysis and justification, still tends to award simple interest; this is exemplified in awards of the Iran-United States Claims Tribunal. At the same time, the Iran-United States Claims Tribunal itself has acknowledged that practice is divided. Thus in McCullough & Company, Inc. v. The Ministry of Post, Telegraph and Telephone, The National Iranian Oil Company, and Bank Markazi (1986), where the claimant

sought interest compounded annually, the Tribunal observed that, "Most awards allocate only simple interest, but occasionally compound interest has been awarded." 11 Iran-U.S. CTR 3, at n. 96. The Tribunal emphasized "the discretion it is empowered to exercise in this field" (*Ibid.*,n. 99).

14. More than this, several important, contemporary arbitral awards (discussed below), rendered by some of the leading international lawyers of this era, have awarded compound interest, and some of these awards cogently analyze and justify so doing. These awards have built upon the criticism of awarding only simple interest developed by three international lawyers of exceptional authority, the late Dr. F.A. Mann (who is quoted above and below), the late Dr. J. Gillis Wetter (whose writings are referred to in a case quoted below), and Professor Gaetano Arangio Ruiz.

15. Professor Arangio Ruiz, after a meticulous examination of the international cases, and writing in his capacity as Special Rapporteur on State Responsibility of the United Nations International Law Commission, concluded in 1989 that compound interest is an available remedy under customary international law and should be awarded in appropriate cases to provide full compensation for the damage suffered. (*Yearbook of the International Law Commission 1989, Volume II, Part 1.*) The Commission has been engaged in the codification of the law of State responsibility for decades, a process nearing its end. That process embodies careful examination of the components of existing law with a view towards its codification, as well as consideration of reform of the law with a view towards embodying elements of progressive development in the conclusions reached by the Commission. On the issue of compound interest, Professor Arangio Ruiz wrote:

105. Although a majority of negative decisions on compound interest may seem to emerge, international jurisprudence is, in the opinion of the Special Rapporteur, not really conclusive in the negative sense:

(a) Among the negative decisions one should distinguish:

(i) the decision that simply adjusts an ill defined negative orientation of previous case–law (*Christern and Company*):

(ii) decisions which, while recalling previous case-law, indicate however that in special circumstances the mechanism of compound interest could be useful in fulfilling the requirement of full compensation (*British claims in the Spanish Zone of Morocco* and *Norwegian Shipowners' Claims*);

(iii) the decision that considers that in the specific case the compound interest mechanism would result in a sum exceeding by far the actual *lucrum cessans (Portuguese Colonies)*;

(iv) the decision which, on the contrary, considers that compound interest, while acceptable in principle, would lead in the specific case in insufficient compensation (*Fabiani*).

(b) As for the cases in which compound interest was awarded, the lack of motivation would seem to suggest that compound interest was considered to be an essential, non-controversial element of reparation by equivalent.

The Special Rapporteur is therefore inclined to conclude that compound interest should be awarded whenever it Is proved that it is indispensable in order to ensure full compensation for the damage suffered by the insured State. (*Ibid.* at 30.)

16. Professor Arangio Ruiz's successor as Special Rapporteur of the Commission is Professor James Crawford. He surveyed the ground once again, in the light of State comments on and Commission consideration of the conclusions of Professor Arangio-Ruiz, and concluded that the Commission's draft articles should include no provision on the character of interest; rather questions of awarding compound interest are "to be resolved on a case-by-case basis". Third Report on State Responsibility, *Yearbook of the International Law Commission*, Part II (2000).

17. *In the Matter of an Arbitration between the State of Kuwait and the American Independent Oil Company (Aminoil),* an eminent Tribunal, composed of Professor Paul Reuter, President, Professor Hamed Sultan and Sir Gerald Fitzmaurice, in 1982 held that Aminoil was entitled to an award of $83,000,000, "at a compound rate of 17.5% annually." The Tribunal did not explain its choice of a compound rate. But what is clear is that the choice was not uninformed. Professor Reuter, a member of the United Nations International Law Commission, was then widely

recognized as the leading French international lawyer. Professor Sultan was an experienced international arbitrator and leader of the Cairo Bar. Sir Gerald Fitzmaurice, for years The Legal Adviser of the British Foreign Office, had served both as a Judge of the International Court of Justice and a Judge of the European Court of Human Rights. They awarded compound interest in a case in which the Tribunal was authorized to determine the law governing the substantive issues between the Parties, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world. While the Tribunal's terms of reference authorized it to award interest, they did not specify whether interest was to be simple or compound. But compound interest was awarded. *Kuwait v. Aminoil*, 66 International Law Reports 518, 613 (1982).

18. *In the Matter of an Arbitration between Compañia del Desarrollo de Santa Elena, S.A. and the Republic of Costa Rica, 38 International Legal Materials 1317 (2000),* a comparably distinguished international tribunal in February 2000 awarded compound interest and persuasively justified its so doing in the following terms:

> 96. Claimant claims that it is entitled to an award of compound interest on the value of the property in 1978, calculated from the date of the expropriation. Respondent argues that no interest is due or, if interest is due, then Claimant is entitled to simple interest only a nominal rate.
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> 97. Even though there is a tendency in international jurisprudence to award only simple interest, this is manifested principally in relation to cases of injury or simple breach of contract. The same considerations do not apply to cases relating to the valuation of

property or property rights. In cases such as the present, compound interest is not excluded where it is warranted by the circumstances of the case.[54/]

98. First, there are international arbitral decisions where compound interest has been expressly allowed.[55/]

99. Secondly, there are decisions where the possibility of compound interest appears to have been acknowledged, but the circumstances were not thought to be appropriate for its award.[56/]

100. Thirdly, there is the decision of Chamber I of the Iran-US Claims Tribunal in the *Sylvania Technical Services* case[57/] in which, although it was stated that "the Tribunal has never awarded compound interest", the Tribunal specifically declared its intention to "derive a

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54/ See *FlexiVan v. Iran* 9 Iran-US CTR 206 ("Most awards allocate only simple interest, but occasionally compound interest has been awarded").

55/ *Fabiani's* case (Moore's Digest of International Law 4878-4915 (1905), the *Affaire des Chemins de Fer Zeltweg-Wolfsberg* (UN Reports of International Arbitral Awards, vol. 3, 1795 at 1808 (1934); *Kuwait v. Aminoil* (66 International Law Reports 518, 613 (1982).

56/ *Norwegian Shipowners' Claims* (UN Reports of International Arbitral Awards, vol. 1, 307, at 341 (1922); and the observations of Max Huber in *Great Britain v. Spain (Spanish Zone of Morocco)* (UN Reports of International Arbitral Awards, vol. 2, 615, 650 (1924)).

57/ Iran-US Claims Tribunal Reports, vol. 8, 298.

rate of interest based approximately on the amount that the successful claimant would have been in a position to have earned if he had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country. Six-month certificates of deposit in the United States are such a form of investment for which average interest rates are available from an authoritative official source."[58/] The late Dr. F.A. Mann has made the following telling comment on this passage: "It is not certain whether the Tribunal realized that investment in six-month certificates of deposit involves earning compound interest."[59/] CDSE [Claimant in the *Santa Elena* case] is entitled to the full present value of the compensation that it should have received at the time of the taking. Conversely, the taking state is not entitled unjustly to enrich itself by reason of the fact that the payment of compensation has been long delayed.

101. Fourthly, there are the views of writers of high authority. Dr. Mann concluded the article just cited as follows: "... it is submitted that, on the basis of compelling evidence, compound interest may be and, in the absence of special circumstances, should

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58/ Iran-US Claims Tribunal Reports, 13, 199.

59/ "Compound Interest as an Item of Damage in International Law", Further Studies in International Law (1990), 380.

be awarded to the claimant as damages by international tribunals."[60/]

102. Finally, reference may be made to the scholarly treatment of the subject by Professor Gaetano Arangio-Ruiz, Special Rapporteur of the UN International Law Commission on State Responsibility. After close consideration of the authorities he concluded as follows: "The Special Rapporteur is therefore inclined to conclude that compound interest should be awarded whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State."[61/]

103. In other words, while simple interest tends to be awarded more frequently than compound, compound interest certainly is not unknown or excluded in international law. No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.

60/ Ibid., p. 385.

61/ Yearbook of the International Law Commission, 1989, Vol. II, Part 1, p. 30.

104. In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.

104. In the instant case, an award of simple interest would not be justified, given that since May 1978, i.e., for almost twenty-two years, CDSE has been unable either to use the property for the tourism development it had in mind when it bought Santa Elena or to sell the property. On the other hand, full compound interest would not do justice to the facts of the case, since CDSE, while bearing the burden of maintaining the property, has remained in possession of it and has been able to use and exploit it to a limited extent.

106. Consequently, Claimant is entitled to an award of compound interest adjusted to take account of all the relevant factors.

19. It should be noted that the members of this Tribunal were L. Yves Fortier, President, and Sir Elihu Lauterpacht and Professor Prosper Weil. Mr. Fortier,

formerly Canada's Permanent Representative to the United Nations, and currently Judge ad hoc of the International Court of Justice, is the President of the London Court of International Arbitration and an international arbitrator of exceptional standing and experience. Sir Elihu Lauterpacht, Honorary Professor at Cambridge University, editor of *International Law Reports,* former President of the Administrative Tribunal of the World Bank and a leading international practitioner for almost fifty years, currently serves as Judge ad hoc of the International Court of Justice. Professor Weil, Professor Emeritus of the University of Paris, is a scholar of extraordinary attainments, the author of many books and articles in the field, an experienced arbitrator and international judge who today enjoys unrivalled stature among French international lawyers. When three international lawyers of the standing of these arbitrators conclude that:

> No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal

it is not possible to sustain the holding of Judge Flannery that "he is constrained to follow the custom" and "must follow this practice" of awarding only simple interest. On the contrary, it is clear that a court of the United States, applying customary international law today, is authorized to award compound interest and is obliged to do so if it adjudges that compound interest is appropriate in the circumstances.

20. *Metalclad Corporation v. The United Mexican* States, 40 International Legal Materials 36 (2001), was an arbitration before an Arbitral Tribunal constituted pursuant to the North American Free Trade Agreement (NAFTA), composed of Professor Sir Elihu Lauterpacht as President; Mr. Benjamin R. Civiletti, former Attorney General of the United States; and Mr. José Luis Siqueiros, a leading Mexican arbitrator. The Tribunal held on August 30, 2000, with respect to prejudgment interest, as follows:

> 128. The question arises whether any interest is payable on the amount of the compensation. In providing in Article 1135 (1) that a Tribunal may award "monetary damages and any applicable interest", NAFTA clearly contemplates the inclusion of interest in an award. On the basis of a review of the authorities, the tribunal in Asian Agricultural Products v. Sri Lanka (4 ICSID Reports 245) held that "interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged" (ibid., p. 294, para. 114). The Tribunal sees no reason to depart from this view. As has been shown above, Mexico's international responsibility is founded upon an accumulation of a number of factors. In the circumstances, the Tribunal considers that of the various possible dates at which it might be possible to fix the engagement of Mexico's responsibility, it is reasonable to select the date on which the Municipality of Guadalcazar wrongly denied Metalclad's application for a construction permit. The Tribunal therefore concludes that interest should be awarded from that date until the date 45 days from that on which this Award is made. So as to restore the Claimant to a

> reasonable approximation of the position to which it would have been if the wrongful act had not taken place, interest has been calculated at 8%, p.a., compounded annually.

The Metalclad decision was appealed by Mexico to the Supreme Court of British Columbia, the designated place of arbitration being Vancouver, B.C. On May 2, 2001, the Court affirmed the arbitral award in part, leaving untouched the award of compound interest.

21. In an even more recent Award of an ICSID Arbitral Tribunal which is not yet published, with the result that the name and parties and arbitrators of the case may not be stated, the Tribunal held as follows:

> 128. To [the amount awarded by the Tribunal as compensation for the Claimant's investment] should be added an appropriate sum for interest. Claimant has claimed interest but neither specified a rate nor whether interest should be compounded. Moreover, the [bilateral investment treaty, or BIT], the lease agreements, and the ICSID Convention and Rules are all silent on the subject of interest. The Panel is of the view that in this case interest should be awarded and that it would be appropriate to adopt a rate of 9% to be compounded quarterly.
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> 129. Like the distinguished panel in the recently-issued *Metalclad* decision, this Tribunal also has determined that compounded interest will best "restore the Claimant to a reasonable approximation of the position in which it

would have been if the wrongful act had not taken place.[290/] Although the *Metalclad* tribunal awarded compound interest without comment, this Panel feels that a brief explanation of its decision is warranted.[291/] This Tribunal believes that an award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations. As Professor Gotanda has observed "almost all financing and investment vehicles involve compound interest.... If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.[292/] For similar reasons, Professor Mann has "submitted that...compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals."[293/]

290/ *Metalclad Corporation v. United Mexican States*, ¶ 128, ICSID Case No. ARB(AP)/97/1 (2000).

291/ As several authorities have noted, "virtually all monetary judgments…contain rulings on interest," and yet, this decision to award interest is often made without any discussion. *See, e.g.*, J. Gillis Wetter, *Interest as an Element of Damages in the Arbitral Process,* 5 Int'l Fin. L. Rev. 20 (1986); F.A. Mann, *Compound Interst as an Item of Damage in International Law*, 21 Univ. of California, Davis L.J. 577, 578 (1988).

292/ John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Amer. J. Int'l. 40, 61 (1996).

293/ F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 Univ. of California, Davis L. J. 577, 586

The Respondent in this case has filed a Request for Annulment with ICSID alleging four defects in the Award, one of which refers to "the appropriate rate of interest, if any."

22. Finally, an award rendered in 1990 in a case in the International Court of Arbitration of the International Chamber of Commerce (ICC) is consistent with the foregoing three international arbitral awards . The governing law was national rather than international but nevertheless the arbitral tribunal referred to the international law of the matter in pertinent terms. The following quotation is from the original English of the award provided by the Secretariat of the ICC Court , the names of the parties being excised in accordance with standard ICC publication practice:

> The Parties disagree with regard to compound interest on the sums due to each of them....
>
> In reality, the Financial Agreement is subject to the rules of international law and the prohibitions of [State X's] internal law – supposing they exist – are not justified on an

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(1988). *See also id.* at 585 ("In this spirit it is necessary first to take account of modern economic conditions. It is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest. On the other hand, many are compelled to borrow from banks and therefore must pay compound interest. This applies, in particular, to business people whose own funds are frequently invested in brick and mortar, machinery and equipment, and whose working capital is obtained by way of loans or overdrafts from banks."); *Starrett Housing Corp. v. Iran*, 16 Iran-U.S. Claims Tribunal 112, 251-254 (1987) (Holtzmann, concurring.)

international level...and public order in internal relations, on that point, does not interfere with international contracts.

Moreover, trade usages which, according to article 13 of I.C.C. Rules of Arbitration, the Tribunal must take into consideration, require it to allow for compound interest in favor of both Parties in the present case. Those usages have been...commented on by Gillis Wetter (International Financial Law Review, December 1986), and by Judge Holtzmann (Iran-U.S.A. Claims Tribunal, case Starrett August 14, 1987), recognized by the famous award Aminoil in 1982, and definitively justified by Professor Mann (On Interest, Compound Interest and Damages, 101 Law Q.R. 30.47, 1987).

As Judge Holtzmann said: "Modern economic reality as well as equity demand that injured parties who have themselves suffered actual compound interest charges, be compensated on a compound basis, in order to be made whole."

The principle of "restitutio in integrum" accepted for many centuries must prevail.

In the present situation, it is the fairest solution taking into account the fact that [Defendant], when borrowing to cope with [Claimant]'s default, had to pay compound interest to its lenders.

> As contended by [Defendant], it is the damages themselves that are compounded and [Defendant] is entitled, per application of articles...and...of the Civil Code of [State X], to be given the benefit of compound interest, in order to get the just "compensation for losses incurred through delay in the payment of his debt" (article...of the Civil Code of [State X]).
>
> Both Parties are thereby equally treated.
>
> [Claimant] is to be awarded – independently of the specific provisions of the Financial Agreement – compound interest on the sums held by [Defendant] (as [Defendant] provided for spontaneously, and [Defendant] on the other hand, must be awarded compound interest on the damages to which it is entitled for additional financial costs.

Award in Case No. 5514, December 1990, published in French translation in Arnaldez, Derains, Hascher, *Collection of ICC Arbitral Awards 1991-1995* (1997), at 463-464.

23. The result is not, as Judge Flannery concluded below, that "in applying customary international law, [the Court] must follow [the] practice" of awarding only simple interest. On the contrary, the result of departures from what once had been predominant among the precedents is today to afford discretion to a court applying customary international law to grant compound interest if it concludes that the circumstances at bar merit compound interest.

CONCLUSION

24. In the light of the foregoing cases and considerations, it is my opinion that customary international law affords the Court in this case discretion as to whether to award simple or compound interest. Any rule of customary international law that debarred compound interest has been overruled by a growing practice permitting the award of compound interest in appropriate circumstances. On my understanding of the facts of this case, such appropriate circumstances are present. The District Court found that the expropriation of McKesson's property interest took place in April 1982, some 19 years ago. I am informed by counsel for McKesson that, if compound rather than simple interest had been awarded, the compensation to be received by McKesson would be approximately $36.3 million instead of approximately $20.0 million. In view of this disparity, it is my opinion that provision of full value for the expropriated property interest in this case requires the award of compound interest under customary international law. *A fortiori,* a United States court must award compound interest when, as in the instant case, a governing treaty, the Treaty of Amity, provides for awarding "the full equivalent" of the property taken. 40 *International Law Material 36 (2001).*

/s/ Stephen M. Schwebel
Stephen M. Schwebel

Washington, D.C.
May 8, 2001

Supreme Court, U.S.
FILED
JUL 24 2002

Nos. 01-1521 and 01-1708

In the Supreme Court of the United States

ISLAMIC REPUBLIC OF IRAN, PETITIONER

v.

MCKESSON HBOC, INC., ET AL.

MCKESSON HBOC, INC., ET AL.,
CONDITIONAL CROSS-PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE OVERSEAS PRIVATE INVESTMENT CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

The petition (No. 01-1521) presents the following questions:

1. Whether the Treaty of Amity, Economic Relations and Consular Rights, June 16, 1957, U.S.-Iran, 8 U.S.T. 899, between the United States and Iran creates a private right of action under United States law for a United States corporation to sue petitioner in a United States court for expropriation.

2. Whether petitioner is immune from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA) because, according to petitioner, the commercial activity at issue did not cause a direct effect in the United States.

3. Whether petitioner is immune from suit under the FSIA because the alleged expropriation was accomplished, in part, through the non-payment of dividends that, according to petitioner, were payable only in Iran.

4. Whether the court of appeals should have directed the district court to enter summary judgment for petitioner.

The conditional cross-petition (No. 01-1708) presents the following additional questions:

5. Whether the court of appeals erred in reversing the entry of summary judgment for cross-petitioner on liability and remanding for further proceedings on one of petitioner's defenses.

6. Whether cross-petitioner was entitled to an award of compound, rather than simple, prejudgment interest.

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In the Supreme Court of the United States

No. 01-1521

ISLAMIC REPUBLIC OF IRAN, PETITIONER

v.

MCKESSON HBOC, INC., ET AL.

No. 01-1708

MCKESSON HBOC, INC., ET AL.,
CONDITIONAL CROSS-PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE OVERSEAS PRIVATE INVESTMENT CORPORATION IN OPPOSITION

STATEMENT

1. Respondent Overseas Private Investment Corporation (OPIC) is a federal agency that insures United States businesses against political risk in their investments abroad and also finances overseas business through loans and loan guarantees. See generally 22 U.S.C. 2194. OPIC was created "[t]o mobilize and facilitate the participation of United States private capital and skills in the economic and social develop-

ment of less developed countries and areas, and countries in transition from nonmarket to market economies, thereby complementing the development assistance objectives of the United States." 22 U.S.C. 2191. OPIC is a corporation wholly owned by the United States Government. It functions as an agency of the Executive Branch, independent of any Cabinet Department but "under the policy guidance of the Secretary of State." *Ibid.* OPIC's guaranty and insurance obligations are backed by the full faith and credit of the United States of America, although the agency operates on a self-sustaining basis at no net cost to the taxpayers. See 22 U.S.C. 2191, 2196, 2197(c).

In 1973, OPIC insured a $2.5 million recapitalization investment in a dairy operation in Iran (Pak Dairy), made by respondent McKesson HBOC, Inc. (then known as Foremost-McKesson, Inc.) and its wholly owned subsidiary (collectively McKesson). By 1980, McKesson owned 31% of the outstanding common stock of Pak Dairy, and OPIC insured 64% of that shareholding interest, providing $5.6 million of coverage against expropriation. Between 1980 and 1982, OPIC paid McKesson more than $4 million, in satisfaction of claims for expropriation by Iran of McKesson's investments in Pak Dairy.

By 1979, petitioner, through its agencies and instrumentalities, owned a majority of the shares of Pak Dairy and was thereby able to exercise effective corporate control over Pak Dairy's board of directors.[1] In this suit, McKesson contends that petitioner used that control to exclude McKesson from its role on the board

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[1] The Iranian agencies and instrumentalities are also named defendants, but they have not appeared or otherwise participated in this case. See Pet. App. 29a n.2, 90a n.4.

and thereby to deprive McKesson of its equity interest in Pak Dairy. McKesson seeks compensation for that unlawful deprivation of its property interest. OPIC has an interest in the suit because it paid insurance claims on a portion of those losses.

2. In 1982, respondents brought this suit against petitioner and certain of its agencies and instrumentalities.[2] At that time, all such claims were subject to a stay and to arbitration before the Iran-United States Claims Tribunal at the Hague. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981); see *Dames & Moore* v. *Regan*, 453 U.S. 654, 684-685 (1981). The claim was presented to the Tribunal, which ruled that petitioner was liable for the failure of Pak Dairy to pay dividends and other amounts due to McKesson in 1979 and 1980. The Tribunal awarded McKesson $1.4 million, which petitioner paid from the security account established under the Algiers Accords. Pet. App. 3a-4a.

In 1986, the Tribunal concluded that there had not been an expropriation of McKesson's interest in Pak Dairy as of January 19, 1981, the date that established the limits of the Tribunal's jurisdiction. Pet. App. 3a-4a. Accordingly, in 1988, respondents renewed this suit, alleging that the actions of petitioner culminated in a total expropriation sometime after January 19, 1981. Years of further litigation, including three appeals, ensued.

3. In the first interlocutory appeal, decided in 1990, the court of appeals held that petitioner was not entitled to sovereign immunity under the Foreign Sover-

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[2] OPIC has statutory authority "to represent itself or to contract for representation in all legal and arbitral proceedings." 22 U.S.C. 2199(d). Pursuant to that authority, OPIC was represented in the courts below by the same counsel that represents McKesson.

eign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.* See Pet. App. 125a-157a. The court concluded that the claims in this case come within the commercial activity exception to the FSIA, 28 U.S.C. 1605(a)(2). Pet. App. 149a-151a. The court of appeals remanded the case, directing the district court to conduct further fact-finding concerning the attribution of the conduct of the agency and instrumentality defendants to petitioner. Pet. App. 135a-148a, 153a-156a.

In that first appeal, the court of appeals also specifically held that the allegations in respondents' complaint —that petitioner's commercial activities in Iran had a direct effect in the United States—satisfied the "direct effect" requirement of 28 U.S.C. 1605(a)(2). Pet. App. 151a. The court pointed out that McKesson had alleged that "there was a constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of Pak Dairy," which was disrupted by the expropriation. *Ibid.* Those "close commercial ties," the court held, contradicted petitioner's claim that the expropriation of McKesson's interest in Pak Dairy would not have any direct effect in the United States. *Ibid.*

4. Following remand from the first appeal, petitioner pursued a second interlocutory appeal. Pet. App. 158a-174a. In that second appeal, petitioner again disputed whether the FSIA's commercial activity exception, 28 U.S.C. 1605(a)(2), applied to the allegations in the complaint. See Pet. App. 165a-166a. The court of appeals again concluded that activities of petitioner alleged in the complaint had "direct effects" in the

United States and that the commercial activity exception therefore applied. *Id.* at 167a. [3]

The court of appeals acknowledged that its first decision was mistaken insofar as it suggested that the FSIA required a showing that the effects in the United States must be "substantial" and "foreseeable." Pet. App. 166a-167a. This Court's decision in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), had expressly rejected "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability,'" in addition to the express statutory requirement that the effects be "direct." Pet. App. 166a (quoting *Weltover*, 504 U.S. at 618). *Weltover*, however, "did not undermine [the court of appeals'] separate determination that these alleged effects were also 'direct.'" *Id.* at 167a. The court of appeals therefore concluded that its earlier decision constituted the law of the case and should not be revisited. *Id.* at 168a. This Court denied petitioner's subsequent petition for a writ of certiorari. *Islamic Republic of Iran* v. *McKesson Corp.*, 516 U.S. 1045 (1996).

5. On remand from the second appeal, the district court resolved the parties' cross-motions for summary judgment. Pet. App. 88a-124a. That decision led to the third appeal, and, in turn, the petition and conditional cross-petition for writ of certiorari that are now before the Court.

a. In 1997, the district court denied petitioner's motion for summary judgment, which was based in part

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[3] The court of appeals also affirmed the district court's findings, after the remand, that the acts of the agencies and instrumentalities represented on Pak Dairy's board of directors were attributable to petitioner—a question left open in the first appeal. Pet. App. 169a-172a.

on the same immunity arguments petitioner had raised in its prior appeals. Pet. App. 123a-124a. The court granted respondents' motion for partial summary judgment, finding petitioner liable for the expropriation of McKesson's interest in Pak Dairy. The court held that the expropriation had become complete by April 5, 1982, when Pak Dairy's board, for the fourth time, paid dividends to Iranian shareholders but not to McKesson, after taking other actions denying McKesson its rights as a shareholder. *Id.* at 114a-116a. The district court concluded that respondents were entitled to relief based on causes of action provided both by customary international law and by the Treaty of Amity, Economic Relations and Consular Rights Between the United States and Iran, June 16, 1957, U.S.-Iran, 8 U.S.T. 899 [hereinafter Treaty of Amity]. Pet. App. 116a-123a.[4] In a later decision, the district court determined that petitioner and its agencies and instrumentalities were jointly and severally liable for more than $20 million in compensatory damages, of which more than $11 million represented simple pre-judgment interest on the losses suffered by respondents. *Id.* at 27a-85a. The court entered final judgment in that amount. *Id.* at 86a-87a.

b. The court of appeals affirmed in part and reversed in part, remanding the case to the district court with instructions to proceed to trial on petitioner's substantive defense to liability. Pet. App. 1a-19a. The court considered once again petitioner's jurisdictional arguments based on the FSIA, holding for the third time that respondents' claims come within the commercial

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[4] The district court noted that respondents had also argued that Iranian law provided a cause of action, but the court did not address that question. Pet. App. 116a n.23.

activity exception, 28 U.S.C. 1605(a)(2). Pet. App. 6a-8a.[5]

The court of appeals then considered the district court's grant of summary judgment on liability. The court held that the Treaty of Amity provides respondents with a cause of action under United States law for an expropriation by petitioner. It did not address the district court's alternative holding that customary international law also provides a cause of action. Pet. App. 10a-11a. The court of appeals concluded, however, that petitioner had raised a genuine issue of material fact concerning its defense that McKesson was required to "come to the company" before receiving its dividends. *Id.* at 11a-14a. The court remanded the case for trial on that question. *Id.* at 15a, 19a.

The court of appeals also upheld the district court's determination of damages. Pet. App. 15a-16a. It rejected respondents' claim that the district court should have awarded compound, rather than simple, prejudgment interest. *Id.* at 17a-19a. The court of appeals concluded that, although the district court may have erred in holding that compound interest was never available under international law in such cases, an award of compound interest was not required and the district court did not abuse its discretion by declining to make such an award. *Id.* at 18a-19a.

The court of appeals denied rehearing and rehearing en banc, modifying the original opinion in part. Pet. App. 20a-24a. Petitioner then sought review in this

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[5] The court also considered Iran's argument that OPIC's claim must be resolved by binding inter-governmental arbitration, pursuant to an international agreement between the United States and Iran. The court held that, even though that agreement might bar OPIC from proceeding, it would have no effect on McKesson's independent claims for the same amounts. Pet. App. 8a-9a.

Court, and McKesson filed a conditional cross-petition for certiorari.

ARGUMENT

The decision of the court of appeals is interlocutory and does not conflict with any decision of this Court or of any court of appeals. The Court should allow the remand to run its course, followed by further appellate review, before deciding whether any of the issues that parties have raised would ultimately warrant this Court's review.

1. This Court's customary practice is to "await final judgment in the lower courts before exercising its certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory character of a case "of itself alone furnishe[s] sufficient ground for the denial" of review); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 196 (7th ed. 1993). There is no reason for the Court to depart from its normal practice in this case.

Petitioner prevailed in significant part below. The court of appeals reversed the district court's grant of summary judgment for respondents and remanded for trial on petitioner's merits defense. The questions presented in the petition (and the second question presented in the cross-petition) will be moot if judgment ultimately is entered in favor of petitioner in the further proceedings ordered by the court of appeals.

Although petitioner raises a claim of foreign sovereign immunity (Pet. 14-20; see Pet. 21-24), that factor does not change the calculus. A claim of foreign sovereign immunity does include immunity from suit and not merely from judgment, and a denial of an assertion of foreign sovereign immunity therefore may, in an appropriate case, warrant review by this Court before final judgment. This, however, is not such a case. The court of appeals has now reviewed the applicability of the FSIA's commercial activity exception to this case three times, and this Court denied an earlier petition for certiorari in this case raising the same question under the FSIA nearly six years ago. 516 U.S. 1045 (1996). Petitioner has litigated this case on the merits for nearly twenty years, and all that remains is a trial on a narrow defense that petitioner itself has raised, and that may well eliminate any occasion for review of the case by this Court. In these circumstances, the additional burden of that trial is incrementally quite small, and does not justify interlocutory review.

2. Petitioner contends (Pet. 9-14) that the court of appeals (like the district court) misconstrued the Treaty of Amity. As explained below, petitioner is correct that the Treaty of Amity does not provide a cause of action under United States law for a United States national to sue a foreign sovereign in federal court for expropriation. Although the court of appeals did not properly evaluate that novel issue, its decision does not warrant review under the circumstances presented here.[6]

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[6] OPIC's position in this Court, which departs from the arguments pressed jointly by OPIC and the private respondents in the courts below, represents the position of the United States Government. See 28 U.S.C. 518 (Attorney General and Solicitor General

a. The court of appeals' conclusion that the Treaty of Amity provides a cause of action because it is "self-executing" (Pet. App. 10a) conflates two separate inquiries. "Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies." Restatement (Third) of the Foreign Relations Law of the United States § 111, cmt. h. (1987). The creation of a private right of action "is analytically distinct from the 'self-execution' concept." Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 721 (1995).

As this Court explained in *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), a treaty is self-executing "whenever it operates of itself without the aid of any legislative provision." But that means only that the treaty is "regarded in courts of justice as equivalent to an act of the legislature." *Ibid.*; see, *e.g.*, *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment."). Like an Act of Congress, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of action. And like an Act of Congress, a self-executing treaty that speaks in terms of individual rights may well create rights that are enforceable by courts in actions that are authorized by or brought under other sources of law.[7]

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will conduct suits in the Supreme Court in which the United States is interested); cf. 22 U.S.C. 2191 (OPIC functions under policy guidance of Secretary of State).

[7] For example, the cause of action in *Foster* (and in *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51 (1833), which involved the same treaty) was a common-law claim for ejectment. Likewise,

The Court's decision in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), illustrates the point. The Court there ruled that the respondents could not sue Argentina for alleged wrongs, explaining that the treaties on which the respondents relied "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Id.* at 442 (footnote omitted). Thus, even if those treaties were self-executing, they did not confer a private cause of action, and the Court held that they therefore did not constitute an express waiver of sovereign immunity under 28 U.S.C. 1605(a)(1).[8]

b. The Treaty of Amity's prohibition against expropriation is self-executing, in the sense that it was intended to establish substantive legal standards without the need for implementing legislation. It states that "[p]roperty of nationals and companies of" one state party to the Treaty "shall not be taken [by the other] except for a public purpose, nor shall it be taken with-

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treaty rights may be raised as a defense in a suit brought under another source of law. See, *e.g.*, Vázquez, *supra*, 89 Am. J. Int'l L. at 721.

[8] The court of appeals' reliance (Pet. App. 10a) on *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985), is misplaced. The concurring judge correctly observed that a non-self-executing treaty cannot confer a private right of action, but the converse is not necessarily true: A treaty that *is* self-executing may or may not confer a private right of action. There was no occasion for the concurring judge to consider that question, and his statement equating self-execution with the creation of private rights of action was accordingly dicta. See, *e.g.*, Vázquez, *supra*, 89 Am. J. Int'l L. at 720-721.

out the prompt payment of just compensation." Treaty of Amity, art. IV, para. 2. That standard is effective of its own force, and imposes a legal obligation on the governments of Iran and the United States. Accord *Asakura* v. *Seattle*, 265 U.S. 332, 341 (1924) (provision of an earlier Treaty of Commerce and Navigation between the United States and Japan "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts").

The Treaty itself, however, does not create a cause of action for United States citizens to sue Iran in United States courts. By its terms, the Treaty says nothing about private rights of action to enforce its substantive provisions. Thus, the Treaty can create such a cause of action only by implication. In the analogous context of statutes, this Court has exercised great circumspection in recognizing causes of action through that means. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 285-287 (2001); see also *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 519 n.3 (2001) (noting that this Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one"); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979) ("The dispositive question remains whether Congress intended to create any such remedy.").

The United States does not interpret the Treaty of Amity to create a private right of action as a matter of United States law for a United States citizen to sue Iran in the courts of this country. The Treaty establishes legal standards and obligations that are designed to protect the nationals (including corporations) of one state party in the territory of the other. Thus, the Treaty prohibits the uncompensated taking of "[p]rop-

erty of nationals and companies of either High Contracting Party * * * within the territories of the other High Contracting Party." Treaty of Amity, art. IV, para. 2. Equally significant, it refers to "access to courts of justice and administrative agencies" by the "[n]ationals and companies of either High Contracting Party * * * within the territories of the other High Contracting Party." *Id.*, art. III, para. 2. But the Treaty does not confer a right of access to the courts of justice by the nationals and companies of one High Contracting Party to that Party's *own* courts, whether to bring an action against the other party or for any other purpose. It therefore does not itself create, expressly or by implication, a cause of action allowing a United States national to bring an action against Iran in a United States court for Iran's expropriation of the United States national's property.[9]

The court of appeals' contrary conclusion is inconsistent with this Court's circumspection concerning implied private rights of action and with the understanding that Congress defines what causes of action are available in United States courts. See *Transamerica*, 444 U.S. at 24. Because the treaty is focused

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[9] This case does not present the separate question whether the Treaty of Amity should be read to create an implied private right of action for Iranian nationals or companies to sue the United States or other government actors in this country (see Pet. 11; Br. in Opp. 10-11). In any event, the standards applicable to the United States and the States under the Fifth Amendment of the Constitution satisfy the substantive standards of the treaty, and ample remedies exist under United States law for foreign nationals, as for United States citizens, to bring takings claims against the government. See 28 U.S.C. 1491; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931); see also *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304 (1987).

on a host government's treatment of aliens, it would be particularly odd to infer a cause of action for United States nationals to sue a foreign government in United States courts. There is similarly no reason to think that, in negotiating the Treaty, the United States anticipated that the Treaty could be invoked to create a cause of action allowing Iranian nationals to sue the United States in the courts of Iran. The courts should not infer the creation of reciprocal rights by which United States nationals could sue Iran in the courts of this country.

The court of appeals' interpretation would be detrimental to the broader foreign relations interests of the United States. The United States is a party to numerous Friendship, Commerce, and Navigation (FCN) treaties. If United States courts conclude that FCN treaties generally should be understood to confer private rights of action on United States nationals to sue a treaty partner in federal court in the United States, it is to be anticipated that the courts of this Nation's treaty partners could reach a similar conclusion, and the United States Government could be subject to a variety of new suits in foreign courts (including Iranian courts) by foreign nationals.

c. Although the court of appeals erred in construing the Treaty of Amity, that error does not warrant review at this time. As McKesson points out (Br. in Opp. 8-9), the court of appeals did not address, and petitioner has not sought review of, any alternative basis for respondents' claims. Respondents' complaint identified at least three alternative sources for the cause of action here—customary international law, the Treaty of Amity, and other applicable law, including in particular Iranian law. See McKesson Lodging L169 - L176. The district court held that both the Treaty of

Amity and customary international law provide a cause of action sufficient to sustain this suit. See Pet. App. 116a-123a. The court of appeals did not address the district court's alternative conclusion that customary international law provides a cause of action. Neither court below addressed any other possible source of law, including Iranian law.[10]

As a result of the remand ordered by the court of appeals, the district court and court of appeals will have an opportunity to consider further those possible alternative sources of a cause of action, as well as to consider the position of the United States, set forth in this brief, that the Treaty of Amity does not create a private right of action. If judgment is ultimately entered against petitioner at the conclusion of further proceedings, the Court can then decide whether to grant review to consider the existence of a cause of action under each of those various sources of law to the extent they remain in the case.

3. Petitioner reasserts (Pet. 14-17) its claim of foreign sovereign immunity, contending that this Court's decision in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), requires that the "act" of a foreign sovereign on which

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[10] For reasons similar to those set forth in the text concerning the Treaty of Amity, even more difficult questions are raised by the proposition that an implied right of action may be recognized under customary international law in the absence of an Act of Congress that codifies customary international law and thereby furnishes at least some statutory basis for a cause of action under federal law in United States courts. Nor have the contours of any cause of action under Iranian law been fully developed below. Because the court of appeals did not reach those issues, this Court does not have the benefit of that court's analysis of those questions. And because those alternative bases for a cause of action are not before the Court, we do not address them further here.

jurisdiction is based, for purposes of 28 U.S.C. 1605(a)(2), must also form an element of the cause of action. That argument, which rests on a misapprehension of both *Nelson* and respondents' claims in this case, is incorrect.

Nelson held that a plaintiff cannot obtain jurisdiction under the FSIA's commercial activity exception, 28 U.S.C. 1605(a)(2), to sue on a cause of action that is itself based entirely on a sovereign's non-commercial activity. 507 U.S. at 356-358. To determine whether the claim was "based upon" the act giving rise to jurisdiction, the Court analyzed whether the jurisdictional acts were among the principal elements of the cause of action. *Id.* at 357. Petitioner mistakenly interprets *Nelson* to require that every element of the cause of action must also be an act that confers jurisdiction under Section 1605(a)(2). But this Court expressly rejected that notion. See *Nelson*, 507 U.S. at 358 n.4. Moreover, there would have been no occasion for such a conclusion in *Nelson* because the Court concluded that the jurisdictional commercial activities in that case formed *no* basis for the cause of action. *Nelson* is satisfied here if commercial activity forms the central basis of the cause of action.

Contrary to petitioner's characterizations, this is a claim for expropriation, not merely for "the cut-off of commercial contacts" or for "the non-payment of dividends." Pet. 16. As the court of appeals recognized, respondents alleged the expropriation took place when petitioner, "acting through its various co-defendants on Pak Dairy's Board of Directors, used its majority position to lock [McKesson] out of the management of the company and deny [McKesson] its share of the company's earnings in the form of dividends." Pet. App. 149a (quoting district court); see also *id.* at 7a

(describing the commercial activity as "freezing-out American corporations in their ownership of Pak Dairy") (quoting *id.* at 152a). The specific acts are laid out in the complaint (McKesson Lodging L169 - L176) and affidavits (see, *e.g.*, *id.* at L31 - L41). Thus, the theory of this suit is that the repeated failure to pay dividends worked in combination with other actions (in particular, as the district court found, the exclusion of McKesson from any voice in Pak Dairy's decisions and the cutoff of contacts with McKesson) to demonstrate that the expropriation was complete. See Pet. App. 7a-8a, 115a. And, as we explain below, the court of appeals concluded that those actions resulted in direct effects felt in the United States (the interruption of the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran"). *Id.* at 167a (quoting *id.* at 151a). That conclusion presents no conflict with *Nelson*.[11]

4. Petitioner also argues (Pet. 17-20) that, under this Court's ruling in *Republic of Argentina* v. *Weltover, Inc.* 504 U.S. 607 (1992), the commercial activity exception applies only if a specific payment or performance is required to be made in the United States. *Weltover* imposes no such rule. *Weltover* sustained the exercise of jurisdiction under 28 U.S.C. 1605(a)(2) because the foreign sovereign there was obliged to make interest payments on bonds in New York. 504 U.S. at 619. In that case, "the plaintiffs [were] all foreign corporations

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[11] There is no merit to petitioner's effort to distinguish between the statutory term "act" and the court of appeals' reference to "commercial activity." Pet. 16. The FSIA itself refutes any such distinction, defining a "commercial activity" to "mean[] either a regular course of commercial conduct or a particular commercial transaction *or act*." 28 U.S.C. 1603(d) (emphasis added).

with no other connections to the United States" who nevertheless chose to designate New York as the place for payment. *Id.* at 618-619. The Court ruled that this choice was sufficient to satisfy the "direct effect" requirement. *Ibid.* The Court did not rule out the possibility that other types of activities could establish a "direct effect" in the United States.

In this case, petitioner's disruption of a United States' corporation's investment in and relationship with Pak Dairy brought to a halt the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of Pak Dairy." Pet. App. 167a; *id.* at 151a. The court of appeals ruled, on the facts before it, that this "constant flow * * * between the United States and Iran"—like the obligation to deliver money to a New York bank in *Weltover*—established a sufficient connection with the United States that the effects of its disruption were plainly felt in this country, within the meaning of 28 U.S.C. 1605(a)(2).

The question whether the nature of a transnational commercial relationship is sufficient to create a "direct effect" is necessarily a fact-specific one. The court of appeals' resolution of that question in this case does not conflict with *Weltover* or with any of the lower-court decisions cited by petitioner (Pet. 18-19 nn.14-16) and accordingly does not warrant review by this Court.[12]

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[12] This case does not present the question whether Section 1605(a)(2)'s "direct effect" standard would be satisfied by the mere non-payment of dividends. As the court of appeals explained, the effects of the expropriation here were much more substantial. Furthermore, the court of appeals' decision quite properly does not suggest that the FSIA's commercial activity exception offers a vehicle for challenging expropriations that are undertaken by

5. Finally, petitioner contends that the court of appeals should have directed the entry of summary judgment in petitioner's favor, rather than merely reversing the grant of summary judgment to respondents and remanding for trial on petitioner's substantive defense. Petitioner provides no sound reason for this Court to exercise its discretionary jurisdiction on certiorari to resolve such a fact-bound, interlocutory question.

a. Petitioner first argues (Pet. 20-24) that it was entitled to summary judgment on the ground that there was no "direct effect" in the United States within the meaning of the FSIA's commercial activity exception. That argument merely restates petitioner's mistaken objections to the application of the FSIA to the facts of this case. See Pet. 22-24 (citing *Nelson*); Pet. 24 ("if Iran's interpretation of *Weltover* and its progeny is correct, Iran was therefore entitled to summary judgment"). It does not provide a separate basis for review. Petitioner's legal argument that the decision below conflicts with *Nelson* and *Weltover* is incorrect for the

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sovereign acts rather than through commercial means. As the FSIA recognizes, the commercial activity exception is distinct from the exception for situations involving a sovereign act "in which rights in property [are] taken in violation of international law." 28 U.S.C. 1605(a)(3). This case is unusual because foreign states normally do not effectuate an expropriation through commercial means. The court of appeals concluded that nothing in Section 1605(a)(3) precludes a finding, in an appropriate case, that an expropriation undertaken by commercial means might also come within the commercial activity exception of Section 1605(a)(2). See Pet. App. 150a n.15; see also *id.* at 110a n.17 (district court's observation that "McKesson's claims are akin to a corporate dispute between majority and minority shareholders"). That conclusion does not conflict with any decision of another court of appeals.

reasons previously explained. Respondents do not seek relief for the "cut-off of commercial contacts" (Pet. 22) or for non-payment of dividends (Pet. 23), standing alone. Instead, they assert that petitioner undertook a full expropriation through commercial means. See Pet. App. 90a-91a (cause of action for expropriation accrues when deprivation of property is irreversible).

b. Petitioner also asserts (Pet. 24-25) that the court of appeals should have directed summary judgment in its favor on the substantive defense that petitioner raised, instead of remanding for trial on that question. That question involves the application of settled law respecting summary judgment to the particular facts of this case. Petitioner's fact-bound claim does not warrant this Court's review.

The parties disputed whether Pak Dairy had imposed a requirement that shareholders or their representatives physically appear to collect their dividends—a "come to the company" requirement. The court of appeals rejected petitioner's broadest argument—that Iranian law imposed such a requirement on all dividend distributions by any Iranian corporation—but held that "Iranian law permitted Pak Dairy's board of directors to adopt such a binding requirement." Pet. App. 12a. The court then concluded that petitioner's affidavits were sufficient to demonstrate a disputed issue of material fact (though not sufficient to compel summary judgment in petitioner's favor) over whether "Pak Dairy exercised its discretion to implement a 'come to the company' requirement." *Id.* at 12a-13a.

The court of appeals acknowledged respondents' objections to the "self-serving, vague, and uncorroborated" nature of the affidavits on which petitioner relied. Pet. App. 13a. Those objections demonstrated the disputed factual question at the center of peti-

tioner's defense—what Pak Dairy's board of directors had actually decided. The court recognized that the question whether summary judgment was properly granted to respondents was a close one. *Id.* at 11a. It ultimately held that petitioner's affidavits were "sufficient to *preclude* summary judgment," but only "in view of the generous reading we owe the opposing party's evidence at this stage." *Id.* at 13a-14a (emphasis added).

Just as the court of appeals concluded that summary judgment in favor of respondents was inappropriate, summary judgment in favor of petitioner would have been inappropriate as well. Respondents raised factual objections to petitioner's "come to the company" defense. The district court found that it would have been futile for McKesson to attempt to comply with a requirement that shareholders appear in Iran, even if such a requirement existed. Pet. App. 14a, 111a-112a. After reviewing the summary judgment evidence on the question of futility, the court of appeals concluded that that question also posed unresolved disputes of material fact. *Id.* at 14a-15a.

6. McKesson's conditional cross-petition urges that, if the Court grants the petition for a writ of certiorari, it should also grant review on two additional questions. Although neither of those questions in the conditional cross-petition warrants review in its own right at this stage of the proceedings, each may warrant review if the Court grants the petition.

a. McKesson urges (Cross-Pet. 9-23), as Question 1 of the cross-petition, that it was entitled to summary judgment on liability, notwithstanding petitioner's defenses. That argument is essentially the obverse of petitioner's contention, in Question 4 of its petition, that petitioner was entitled to summary judgment.

Whether viewed from petitioner's or McKesson's perspective, the basic issue—whether the court of appeals properly applied settled standards for granting summary judgment to the facts of this case—does not warrant this Court's review. The court of appeals' application of law to the facts does not present any issue worthy of this Court's determination. Nevertheless, if the Court were to grant review of Question 4 of the petition, it should also grant review of Question 1 of the cross-petition. Because the questions are essentially the obverse of one another, if the Court were to grant one, it should also grant the other.

b. McKesson also urges (Cross-Pet. 23-29) that, if the Court grants the petition, it should also review the court of appeals' determination that the district court did not abuse its discretion in awarding simple, rather than compound, prejudgment interest on the damage award. Pet. App. 17a-19a. That issue would not normally warrant this Court's review. Like the rulings that petitioner challenges, the court's prejudgment interest ruling is interlocutory and, in any event, does not conflict with any decision of this Court or any other court of appeals. Furthermore, the court of appeals' fact-specific determination that the district court acted within its discretion in awarding simple interest does not present an issue of sufficient importance to justify this Court's review.

This Court has recognized that an award of prejudgment interest ordinarily "rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury," *City of Milwaukee* v. *Cement Div. Nat'l Gypsum Co.*, 515 U.S. 189, 196 (1995) (quoting *The Scotland*, 118 U.S. 507, 518-519 (1886))—subject, of course, to whatever limitations are imposed on the exercise of that discretion by

applicable laws.[13] See Pet. App. 19a. As a general matter, "the decision whether to award compound or simple interest is in the trial court's discretion." *EEOC* v. *Kentucky State Police Dep't*, 80 F.3d 1086, 1098 (6th Cir.), cert. denied, 519 U.S. 963 (1996); see, *e.g.*, *Rite-Hite Corp.* v. *Kelley Co.*, 56 F.3d 1538, 1555 (Fed. Cir.), cert. denied, 516 U.S. 867 (1995) (upholding award of simple rather than compound interest). See Pet. App. 18a-19a. There are no compelling grounds for concluding that the district court abused its discretion here.[14]

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[13] Similarly, the Iran-United States Claims Tribunal has held that in its proceedings, "[t]he determination of the applicable principles of law in any given case, and consequently the question of whether an award of interest is appropriate, must rest with the [Tribunal] Chamber concerned," relating as it does "to the exercise by the Chambers of the discretion accorded to them in deciding each particular case." *Islamic Rep. of Iran* v. *United States*, 16 Iran-U.S. Cl. Trib. Rep. 285, 290 (1987).

[14] McKesson argues that there is a presumption in favor of compound interest. No such presumption appears, however, in the rules of most States, foreign legal systems, and international law. Indeed, a considerable number of legal systems and international law authorities proscribe or sharply limit the use of compound interest and limit prejudgment interest to simple rates. See, *e.g.*, Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 Tex. L. Rev. 293, 306-307 (1996) (urging change from "[t]he traditional, common-law rule * * * that prejudgment interest is not compounded," which remains the "majority rule" among States); *id.* at 306 n.76 (noting that prohibition on compound interest is the rule in the United Kingdom, citing *President of India* v. *La Pintada Compania Navegacion S.A.*, [1984] 1 A.C. 104); Pet. App. 18a ("compound interest is not generally awarded under international law or by international tribunals") (quoting James Crawford, *Third Report on State Responsibility*, [2000] 2 Y.B. Int'l L. Comm. 50 U.N. Doc. A/CN.4/507/2000/Add.1).

Nevertheless, if the Court were to grant the petition, it may wish to grant review of Question 2 of the cross-petition as well. If the Court grants the petition on Question 1, concerning whether the Treaty of Amity creates a private cause of action in the circumstances of this case, resolution of the substantive source of law for any cause of action available to respondents in this case —the Treaty, customary international law, or Iranian law—could have a bearing on the question of the award of simple or compound interest under that particular source of law. Similarly, if the Court decides to undertake what would necessarily be a fact-intensive review of other aspects of the case, then it may find it beneficial to preserve the option of addressing all of the outstanding issues. And insofar as the Court's decision might alter the underlying judgment, the Court may wish to preserve the option of directing the district court to reevaluate its exercise of discretion in awarding prejudgment simple interest in light of any changed circumstances that the Court's decision might provide.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in No. 01-1521 should be denied. However, if the Court grants the petition in whole or in part, then it should also grant review on Question 2 of the conditional cross-petition for a writ of certiorari in No. 01-1708. If the Court grants review on Question 4 of the petition, it should grant review on Question 1 of the conditional cross-petition.

Respectfully submitted.

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JULY 2002

(3)

Supreme Court, U.S.
FILED
JUL 24 2002
OFFICE OF THE CLERK

No. 01 -1708

IN THE
Supreme Court of the United States

ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

MCKESSON HBOC, INC., et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IRAN'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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33P9

QUESTIONS PRESENTED

1. Whether the court below erred when it reversed the district court's grant of summary judgment, finding that Iran had raised genuine issues of material fact.

2. Whether the court below erred in not disturbing the district court's exercise of discretion in awarding simple, rather than compound, pre-judgment interest.

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COUNTERSTATEMENT OF THE CASE

In its filings at the Iran-United States Claims Tribunal ("Tribunal"), Iran did not rely on the "come to the company" "defense" as just establishing "custom and practice." Contra McKesson's Cross-Petition ("CP") 3. In its Complementary Statement of Defense filed with the Tribunal in 1983, McKesson's Lodging ("L") 182-186, Pak Dairy ("Pak") not only referred to the procedure as "the normal routine," L184, but also referred to it as involving "right[s]" and "legal" "obligat[ions]," L185. In consequence, when Iran first raised the "come to the company" defense in the district court, it did not "recast" the defense as a legal requirement, rather than just a "custom or practice." Contra CP 4.

McKesson's assertion, CP 3, that the Tribunal "was not persuaded" by the "defense" is incorrect. See infra, p.3 and n.1

In its decision on the cross-motions for summary judgment, the district court did not reject Iran's "come to the company" defense because it was "unsubstantiated by any credible evidence," as McKesson claims. CP 4. Rather, the district court specifically declined to rule on the conflicting evidence as to the existence of the requirement. It granted McKesson's motion, holding that even if there were such a "procedural" requirement, McKesson never knew about it and "it would have been futile for McKesson" to have attempted to comply with the requirement. Iran's Appendix ("PA") 111a-112a.

As we show infra, pp. 5-8, Iran did present "credible" "contemporaneous evidence" supporting its claim that Pak's board had adopted the "come to the company" requirement. Contra, CP 4.

McKesson's suggestion, CP 5, that the only reason that the district court gave for awarding simple interest as a matter of discretion was "the almost uniform practice of awarding only simple interest," is incorrect. The court also relied on the practice of the Tribunal and of the United States' Foreign Claims Settlement Commission in deciding claims for expropriation against Iran. The court did so because these "claims" were "directly comparable to Plaintiff's own." Cross-Petitioner's Appendix ("CA") 17a. The court found that these cases "and the other authorities supporting their practice," which the court had addressed earlier in the opinion, "offered persuasive guidance." Id. Thus, the court based its conclusion that simple interest was the appropriate award on all of these authorities and considerations.

As we show, infra, pp. 7-8, Iran did submit corporate documents supporting Mr. Dadyar's statement that Pak had adopted the "come to the company" requirement. Contra, CP 6.

McKesson's assertion, CP 6, that the court of appeals ignored "substantial record evidence" contradicting the Dadyar affidavits, and failed to take into account inconsistencies between Dadyar's affidavit and other affidavits, is incorrect. As we show, infra, pp. 8-11, no such record evidence or inconsistencies exist.

ARGUMENT

I. THE ASSERTED VIOLATIONS OF WELL-ESTABLISHED PRINCIPLES DO NOT MERIT REVIEW.

We do not agree that the court of appeals violated any "well-established principles" as McKesson contends. Even if

there were violations, McKesson has not shown that there is a split in the Circuits with respect to the principles, or any other reason why these issues merit review by this Court. See Rule 10 of the Rules of this Court.

We respond below to McKesson's points in roughly the order they were made by McKesson (although this sometimes leads to repetition because the arguments repeat). What we show, we submit, is that not only was the court of appeals correct that the genuine issues it identified prevented summary judgment for McKesson, but numerous other issues did as well. Indeed, Iran was entitled to summary judgment, not McKesson.

As we have stated, supra, p.1, the "come to the company" defense presented at the Tribunal was not exclusively a "custom and practice" defense. Contra, CP 6.

McKesson does not explain the basis for its assertion that Iran's "defense was unsuccessful" at the Tribunal. See CP 9. The Award, Foremost Tehran, Inc. v. Iran, 10 Iran-U.S.Cl.Tr.R. 228, 246-250 (1986), L171-225, never mentions the defense, and Iran's overall defense was successful. The Tribunal rejected McKesson's expropriation claim. We think the implication of the Award is that the Tribunal accepted the defense.[1]

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[1] The Tribunal's jurisdictional cut-off date was January 18, 1981. Its rulings on Iran's liability for the dividends due in 1979 and 1980 and for expropriation were made as of that date. As Iran reads the Award, Iran was found liable for the dividends due in 1979 and 1980 as of January, 1981, because the dividends were overdue on that date and there was a telex from Pak Dairy, unretracted as of that date, stating that McKesson would not be paid regardless of what it did. Implicitly, the Tribunal ruled that McKesson was excused from compliance with the "come to the company" rule as to these dividends on the ground of futility. Iran, however, was not liable for the dividends due in 1981 and

Despite McKesson's suggestion to the contrary, CP 9, Iran raised the "come to the company" defense at the proper time in the litigation, that is, when the cross-motions for summary judgment, filed in 1996, first presented the parties' arguments on the merits. The defense was always a legal as well as a "custom and practice" defense. We cannot agree, for reasons we give in detail infra, pp. 5-8, that there was not "any evidentiary support" that it was a "requirement under Iranian corporate law" or one "adopted by Pak Dairy's board of directors." Contra CP 9.

A. THE COURT OF APPEALS VIOLATED NO WELL-ESTABLISHED PRINCIPLES IN REVERSING THE SUMMARY JUDGMENT IN FAVOR OF MCKESSON.

We have no quarrel with McKesson's recitation of "well-established principles" that govern summary judgment, CP 10-12. We disagree, however, that the court of appeals violated them in setting aside the summary judgment.

We disagree, contra CP 12, that the "come to the company" requirement was a "defense" in the sense that Iran had the initial burden of disproving that McKesson had been

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thereafter and not liable for expropriation because in the two late 1981 telexes Pak Dairy announced its "readiness" to pay dividends once again. That is, once Pak Dairy announced its willingness to pay, McKesson no longer had a futility defense and the "come to the company" requirement was recognized as valid. See Foremost Tehran, supra, at 246-250, L203-207. The implication that the Tribunal accepted the "come to the company" "defense" is fair because "readiness" to pay by Pak - without actually paying - would not be a defense to a charge of failure to pay overdue dividends unless McKesson was required to meet some precondition to payment such as failure to comply with the "come to the company" requirement.

unlawfully deprived of its dividends. McKesson, as plaintiff, had the initial burden to demonstrate that under the applicable law it was entitled to relief. McKesson made no attempt, by submitting an opinion on Iranian law, to do so. Iran attempted to demonstrate, by submitting opinions on Iranian law, that McKesson could not meet its burden under the applicable law because McKesson had not complied with the "come to the company" requirement. That attempt did not shift the initial burden to Iran.[2]

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[2] Under non-discriminatory Iranian law, the burden is on a plaintiff stockholder to establish that he has been illegally deprived of his dividends. E.g., First Fakhari Legal Opinion, ¶¶13-15, 39; JA 344-345, 354. Iran attempted to persuade the district court and the court of appeals that if a Pak stockholder did not comply with the "come to the company" requirement, he was not entitled to his dividends under Iranian law. The court of appeals remanded for a trial on whether Pak had in fact adopted the requirement.

What the court of appeals failed to note was that, even if the district court found on remand that Pak had not adopted the procedures, that would not suffice to show that Pak had illegally denied McKesson its dividends. McKesson made no attempt to show what procedures Pak's board had adopted for the distribution of dividends that Pak had not complied with in this case.

McKesson never submitted a legal opinion arguing that, pursuant to Iranian law, or Pak's articles, or a decision of Pak's board, Pak was legally required to mail McKesson a check, as is typically done in the United States. Mailing a check would have been completely futile, because the dividend was payable in Iranian rials. Pak could not on its own convert the rials into dollars. That required action by the Iranian central bank. As to establishing a bank account and transferring the dividends to it, McKesson made no attempt to show that Pak was legally obligated to set up such a bank account, much less transfer the dividends.

In effect, McKesson's position was that because it did not receive its dividends, Pak, and because Iran controlled it, Iran, was legally at fault. McKesson, however, never provided an opinion on Iranian law showing that Pak was under any legal obligation to do anymore than credit the dividends to McKesson's account, which is

B. THE COURT OF APPEALS DID NOT OVERLOOK ANY IMPORTANT EVIDENCE THAT JUSTIFIED THE DISTRICT COURT'S SUMMARY JUDGMENT AWARD.

1. PROBATIVE EVIDENCE FULLY SUPPORTED DADYAR'S AFFIDAVITS ON THE "COME TO THE COMPANY" REQUIREMENT AND THERE WAS NO SIGNIFICANT EVIDENCE TO THE CONTRARY.

McKesson seeks to rely on the principle that a party cannot avoid summary judgment by relying on "unsupported affidavits." See CP 10. That is not the case here. Dadyar's affidavits were well-supported. The court of appeals' statement that Dadyar's affidavits referred to "no documents supporting his assertion" or that they were, more generally, "unsupported" with respect to the come to the company requirement, PA 13A, should be read together with the district court's finding to which the statement refers.

When ruling on the cross-motions for summary judgment, the district court specifically recognized that he could not make a finding as to the existence of the requirement, because to do so would require him to resolve a genuine issue as to the meaning of the Persian word "*moradje'e*."[3] As we

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what Pak did.

[3] By a translator's affidavit, McKesson put in issue the accuracy of the translation of the Persian word "*moradje'e*" in two documents attached to Dadyar's affidavits, Pak's boards' minutes dated October 26, 1981, and a memo from Pak's managing director dated October 31,

pointed out, supra, p. 4, the court assumed the existence of the requirement but granted summary judgment against Iran regardless, because (1) "it was undisputed that McKesson never knew about [the requirement]," and (2) compliance with it would be "futile," PA 111a-112a.

In ruling against Iran on its two subsequent motions for summary judgment or reconsideration, the district court shifted ground. Placing the burden on Iran to prove the requirement, it denied Iran's two motions, because none of Pak's documents showed that Pak had "officially" or "formally" adopted a "binding" requirement. CA 26a-27a (2nd motion), 21a (3rd motion). Iran had not produced "any minutes of Pak Dairy's Board of Directors in which a 'come to the company' requirement was imposed." CA 21a.[4] We think this is all that

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1981, to Mr. Dadyar. Iran filed an opposing affidavit from another translator. JA 411-428; 465-466. Simplifying, the question was whether "*moradje'e*" meant "come to" the company physically or just contact it.

[4] In its second motion for summary judgment and first for reconsideration, Iran submitted legal opinions to the effect that the two issues based on which the district court had granted judgment for McKesson, (1) lack of knowledge, and (2) futility, would be resolved in favor of Pak by an Iranian court. McKesson submitted no opposing legal opinions. Unlike the ruling on the cross-motions, the district court's ruling on the second motion does not mention lack of knowledge and retracted its reliance on futility. CA 23a-28a and n. 3. As explained above, the court then – for the first time – resolved the issue of the existence of the "come to the company" requirement against Iran . The reason was not that the defense was unsubstantiated by "any credible evidence," see CP 4, but rather that Iran had not produced a document in which Pak had "officially" or "formally" adopted a "binding" requirement. CA 26a-27a.

In support of its third motion for summary judgment and second for reconsideration, Iran filed a legal opinion to the effect that, whatever other meanings "*moradje'e*" had in Persian, an Iranian court

the court of appeals meant by "no document" or "unsupported."

Otherwise, the court of appeals' finding is itself unsupported, not only by the district court's findings, but by the record as well, because the Dadyar affidavits were generally supported by perhaps a 100 pages of attachments from Pak's records in Persian and English. Among these were two exhibits to Dadyar's affidavits that specifically supported Dadyar's testimony that Pak had adopted the "come to the company" requirement. These were the two documents containing the Persian term "*moradje'e*." Properly translated, the documents showed that Pak's board and general manager believed that there was a "come to the company" requirement for the dividend declared in 1981 and followed it. Arguably, they showed that Pak's board had adopted the requirement, at least for 1981.[5] Copies of four receipts, signed on behalf of other

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would interpret "*moradje'e*" here to mean "come to the company" physically. Furthermore, this language "impos[ed] a legal requirement." Finally, even without any document showing that Pak had adopted the requirement, an Iranian court would rule for Pak, because, "[i]n Iran it is assumed that there is a legal a requirement of physically appearing at the company with a receipt." 4th Fakhari Legal Opinion, ¶¶8-9; JA 465-466; see CA 12a. McKesson did not file an opposing legal opinion on this point. The district court nevertheless denied Iran's motion. Its opinion does not provide further reasons on the "come to the company" point. Instead, the court restates that Iran did not produce the required document, and reinstates, without giving any substantive reason, its "futility" finding. CA 20a-22a.

[5] The minutes of Pak's board meeting of October 26, 1981, recorded the board's "deci[sion] to credit the dividend to foreign shareholders, like the previous years, to their account until they come to the company to collect it." Ex. 4 to 2nd Dadyar Affidavit, L294-298, see L297. The memo from Pak's Managing Director, dated October 31, 1981, to Pak's "Accounts Department," instructed that "[t]he foreign shareholders' profits will be credited to their account as in the past so

shareholders in 1981 and 1982 in accordance with the requirement, were also attached to one of the affidavits.

The two Dadyar affidavits were also generally supported by no less than 10 additional affidavits and legal opinions, plus supporting exhibits, on the issue of the requirement, as follows: 1. Pak was not in default because McKesson had not complied with the "come to the company" requirement (1st, 2nd, 3rd and 4th Fakhari Opinions, 1st Vafai Opinion, Yavari Opinion); 2. Pak had in fact adopted the "come to the company" requirement (Pezeshk Affidavit, 1st, 2nd, and 3rd Dadyar Affidavits); 3. The requirement was universal in Iran (Farid Affidavit, 1st Dadyar Affidavit, 1st Vafai Opinion); 4. An Iranian court would enforce the requirement even without the production of a board resolution showing that Pak adopted the requirement (4th Fakhari and 2nd Vafai Opinions). McKesson submitted no affidavits and no legal opinions taking issue with these affidavits and legal opinions on the issue of the requirement.

The evidence that McKesson now proffers to this Court as being contrary to Dadyar's affidavits, CP 13-17, is fully consistent with Iran's position. There was no reason for Mr. Patterson to know about the requirement or for Mr. Fisher to mention it in his affidavit. Fisher was the day-to-day manager of the dairy in Tehran, as well as McKesson's representative, and easily able to comply with the "come to the company" requirement on behalf of McKesson. There was no reason for

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that it could be paid to them upon their coming to the company." Handwritten on the memo was a note to "Mr. Dadyar, Please take action," "[s]hare dividend of the shareholders who did not come last year to collect their cheque ... be transferred to Account No. 2020." Exhibit 4 to 1st Dadyar Affidavit, L252-261, see L255, emphasis supplied.

the requirement to be mentioned in board meetings or in correspondence. As established by Iran's many affidavits and legal opinions, its existence was not an issue. We agree that the May, 1980 telex did not give as a reason for not paying dividends failure to comply with the requirement. As the Tribunal found, before 1981, Pak was "discriminating" against McKesson. L206. Contra CP 12-16. Finally, that documents produced by Pak in discovery do not mention the requirement is also consistent with Iran's position. The requirement, in Iran, is assumed. Contra CP 16-17.

In any event, McKesson proffered none of this evidence in its statement of material facts as to which there was no genuine issue in support of summary judgment. Nor would it have been useful to do so. None of this evidence was of the quality required by Rule 56, F.R.CivP. to establish that there was no genuine issue of material fact. None of it is an affidavit by a witness stating that he was at Pak during the relevant period (roughly 1977 through 1983) and Pak did not enforce a "come to the company" requirement. See Rule 56(e), F.R.Civ.P. Fisher was at Pak during the relevant period, but his affidavit does not address the issue.

Again, as shown above, p. 3, n. 1, the Tribunal's opinion never mentions the "come to the company" requirement, and its finding that Iran was liable for non-payment of the 1979 and 1980 dividends is implicitly consistent with acceptance of the requirement. Contra, CP 16.[6]

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[6] McKesson suggests that the Tribunal's purported ruling rejecting the "come to the company" requirement has "preclusive effect." CP 16. To begin with the Tribunal made no such ruling, See p. 3, and n. 1, supra. Moreover, McKesson waived the argument by not making it either in the district court or the court of appeals. The district court rejected Iran's argument that the Tribunal's finding that Pak was

The adverse inference rule does not come into play because, as we have shown, supra, p. 6-9, Iran produced powerful evidence that Pak had adopted the "come to the company" requirement. Contra CP 16-17

2. THERE WERE NO INCONSISTENCIES IN IRAN'S EVIDENCE ON THIS ISSUE.

McKesson quotes from the Pezeshk and the first two Dadyar affidavits, see CP 17-18, and argues that they are inconsistent. Mr. Pezeshk wrote that "to receive the dividends" McKesson could "refer to or otherwise correspond with" Pak. L235. Pezeshk did not state what Pak's response would be. He did not say that the response would not be that McKesson should comply with the "come to the company" requirement. Another possibility was that the board might excuse the requirement. Dadyar stated: "Although not obligated to do so, Pak Dairy occasionally made exceptions to its requirement that the dividends be collected as set out above. However, [McKesson] never formally requested such an exception in 1981 or thereafter and Pak Dairy never made such an exception to the requirement for [McKesson]." L301. McKesson, it is to be noted, submitted no legal opinion contending that under Iranian law Pak's board was obliged to make an exception in this case nor any evidence that the board in fact did so. As explained, n. 4, supra, absent positive evidence to the contrary, an Iranian court would rule that the shareholders were bound by the "come to the company" requirement.[7]

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ready to pay the outstanding dividends in late 1981 had preclusive effect. PA 97a.

[7] There is no "inconsistency" between the existence of the "come to the company" requirement and the lack of a reference to the

Whether Dadyar found minutes or other evidence in Pak's files showing that Pak's directors had "exercised" and "adopted" the requirement, see CP 18-19, depends on the proper translation of "*moradje'e.*" Ruling on McKesson's motion, the district court was bound to resolve the question in Iran's favor. In consequence, there was no reason for Dadyar to explain. In any event, there was an obvious explanation. According to Dadyar the requirement had been in effect "since long ago." L300. The document may have been lost. McKesson never explains why this is material. Iran's many unopposed affidavits and legal opinions demonstrated that the lack of such a document would have no significance under the controlling law, the law of Iran. As shown, supra, n. 4, an Iranian court would enforce the requirement without such a document.

Neither of the cases on which McKesson relies here, CP 19, supports its position in this case. We agree that a nonmoving party cannot create a genuine issue of material fact sufficient to withstand summary judgment by submitting an affidavit that contradicts a prior affidavit of the same party, absent an explanation sufficient to permit a fact finder to rule in its favor. Here, the affidavits are not contradictory; a sufficient explanation has been provided; and overwhelming other evidence submitted by Iran show that Iran's position is correct.

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requirement in the Articles of Association. Contra, CP 18. The Articles provide that the board of directors will choose the mode of payment, if it is not chosen at the general meeting. See PA 110a-111a. It is not "inconsistent" with that provision that the Articles do not then go on to specify what the mode of payment will be. Quite the contrary.

3. THERE IS NO BASIS IN IRANIAN LAW FOR MCKESSON'S FUTILITY ARGUMENT.

McKesson's "futility" argument, CP 19-23, suffers from two general faults. First, the legal standard against which the evidence supporting futility is to be measured is never explained. As we have said, P 20, both McKesson and Iran relied in the courts below on non-discriminatory Iranian law for purposes of deciding whether McKesson's shareholding interest was taken. Iran submitted two legal opinions that an Iranian court, acting without discrimination, would not accept a futility defense to the "come to the company" requirement on the facts of this case. JA 433; JA 448-451. McKesson did not submit a legal opinion of Iranian law to the contrary. Its futility argument was properly rejected on this ground alone. See P 25.[8]

Second, the evidence tendered to support futility is not directed to the specific situation in question, viz., whether it would have been futile for McKesson to comply with Pak's "come to the company" requirement beginning in the Fall of 1981, when Pak, as the Tribunal found, L247, "stated its readiness to pay, in Rials, the dividends." The evidence showing Iran's hostility to U.S. investment before 1981 or hostility to other U.S. investments in 1981 or thereafter, see CP 20-21 and nn. 10-11, is beside the point.

Specifically, contrary to McKesson's assertion, CP 21, Mr. Vahdati's April, 1981, request for dividends at a Pak board meeting did not comply with the "come to the company"

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[8] We do not think that McKesson would fare any better under U.S. law. See, Randolph-Sheppard Vendors of America v. Weinberger, 795 F. 2d 90, 105 (D.C.Cir. 1986)(failure to exhaust administrative remedies only excused where adverse decision "certain").

requirement. To comply with the requirement, a shareholder, or its representative, must come to the company within the time period appointed with appropriate identification. The dividend check is then exchanged for a receipt especially prepared for the purpose. L-0330. A representative of a shareholder must show that he has authority to collect the dividend. L-297-298. Six proxies authorizing Vahdati to vote at Pak's shareholders' meetings are attached to the Pezeshk Affidavit. See L-228, ¶7. There is nothing in the record showing that Vahdati had authority to collect dividends in accordance with the "come to the company" requirement. Even if he had had authority, he was too late to pick up the 1978 and 1979 dividends (evidently declared in April, 1980), and too early for the dividend principally in issue in this case. The dividend declared for the year 1980 was not ready for pickup by any shareholder until October 31, 1981. No representative of McKesson came to pick up the dividend for that year or any year following. Therefore, the dividends were credited to McKesson on Pak's books in accordance with Pak's articles and the Commercial Code. L255-256; 297-298.

McKesson also argues that the November, 1981 telex was just an offer to "negotiate," and cannot be read as an offer to pay the dividends. CP 21-23. The telex relevantly states: "As regards the payment of your dividend, this company has repeatedly announced its readiness for taking proper measures but you have not taken appropriate action in this regard. If you really mean to settle this issue, you can introduce your plenipotentiary representative to us so that necessary steps may be taken according to the current regulation." L137. The Tribunal read this to mean that Pak was "ready" to pay the dividends in its final ruling on the merits after trial. L204. We do not see how the telex can be read not to at least raise a genuine issue as to whether Pak was ready to pay the dividends in a pre-trial ruling where Iran was entitled to the benefit of

every reasonable inference.

In any event, an offer to "negotiate" does not exclude a willingness to pay the dividend. Even as characterized in McKesson's note 12, CP 22, it was McKesson, not Pak, that finally refused to negotiate in Vienna, and McKesson that withdrew its directors from Pak's board over Pak's protests in 1981. Even leaving aside McKesson's burden on summary judgment and viewing the question merely as one of common sense, any doubts as to what would have happened if the negotiations had gone forward or if McKesson had not withdrawn its directors from the board should be resolved against McKesson.

Iran submitted three affidavits on the futility issue. Dadyar twice stated that if McKesson had complied with the "come to the company" requirement in 1981 and thereafter, that Pak would have paid the dividends. L260-261, 301. Dr. Vafai, the expert on Iranian law at the U.S. Library of Congress, agreed. He explained that in his judgment it would not have been futile to comply with the "come to the company" requirements in 1981 to obtain the dividends, for many reasons. Notable among these reasons were (1) it was in Iran's and Pak's economic interest to pay the dividends in rials once the Tribunal had been established with a designated security account - in dollars - to pay any judgment, and (2) McKesson had technology and other information that was useful to Pak. JA 454-455, ¶4.[9]

Finally, Iran's position on this point was preserved in an

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[9] We are lodging under seal with the Clerk of this Court documents that were sealed by the district court showing that, at least in 1981, it was McKesson that cut off commercial relations with Pak, not the other way around. See P 7 and n. 2.

detailed statement of genuine issue. JA 374-379. Iran's position was that the expropriation was faked. As set out in counsel's Rule 56(f) affidavit, "McKesson was well aware how dividends were paid under Iranian law, but chose not to pick up its dividends so as to bolster its position before the Tribunal." JA 383, ¶5. Iran requested discovery on this issue, which the district court denied. Even if Iran was not entitled to summary judgment on futility - because it established by unopposed legal opinions that that is how an Iranian court would rule - Iran had clearly raised a genuine issue of material fact.

II THE SIMPLE INTEREST AWARD DOES NOT MERIT REVIEW.

A. THE ARGUMENT ON WHICH MCKESSON RELIES IN THIS COURT WAS NOT DEVELOPED BELOW NOR IS THERE ANY OTHER FACTOR IN THIS CASE THAT WOULD MERIT REVIEW OF THIS ISSUE BY THIS COURT.

McKesson's principal argument in the court of appeals was that compound interest should have been awarded because the Treaty of Amity, which requires "just compensation" representing the "full equivalent" of the property taken, required it. Even if the Treaty did not trump customary international law ("CIL"), CIL permitted compound interest in appropriate cases, of which this was one. In one paragraph in its opening brief, p. 65, and in one repetitive paragraph in its reply, p. 31, McKesson argued that federal common law required the district court "to make plaintiff whole," the argument McKesson makes here, CP 23-29.

Iran's response in the court of appeals was that the Treaty did not address the issue of compound interest at all; CIL

therefore controlled; under CIL only simple interest could be awarded; if CIL permitted compound interest awards, the district court properly exercised its discretion to award only simple interest.

The court of appeals ruled that compound interest was allowable under CIL, but the district court had properly exercised its discretion in awarding simple interest. PA 17a-19a. In its concluding paragraph, the court of appeals noted:

> ... It is true, as McKesson points out, that some federal common law principles require courts to "make the plaintiff whole." Appellee's Opening Br. at 65. Even if these principles support awards of compound interest in tort cases, however, they fall well short of proving that the district court abused its discretion, particularly in light of the court's reliance on a far more relevant authority: the decisions of the Claims Tribunal, which invariably awards simple interest.

Thus the issue which McKesson presents here was at most a subsidiary one below that was not extensively briefed nor extensively ruled upon by the court of appeals. Nor has McKesson explained that there is another factor in this case, such as a split in the circuits, that should motivate the Court to grant certiorari on this issue. Finally, as we show below, the court of appeals ruling is manifestly correct.

B. THE COMPOUND INTEREST ISSUE WAS CORRECTLY DECIDED BOTH BY THE DISTRICT COURT AND THE COURT OF APPEALS.

McKesson cites the court of appeals opinion, PA 17a-18a, for the proposition that "There is no settled principle of customary international law governing the availability of compound prejudgment interest." It then cites the district court's opinion, PA 79a, for the proposition that where "such a rule is lacking in a case otherwise controlled by international law, federal courts apply federal common law." CP 23.

McKesson's mischaracterizes the court of appeals' opinion. Although the court never committed itself unequivocally, it stated that "most contemporaneous sources" take the view expressed in the Third Report on State Responsibility Submitted to the International Law Commission of the United Nations, 2 Y.B.I.L.C. 50 (2000), to wit, "although compound interest is not generally awarded under international law or by international tribunals, special considerations may arise which justify some element of compounding as an aspect of full reparation." PA 18a. Thus, the court of appeals' view was not that there was no settled principle of international law. The settled principle was that compound interest would not be awarded absent "special" circumstances which "may" arise justifying "some" element of compounding.

McKesson's reliance on the district court opinion, at PA 79a, for the application of federal common law where "such" a customary international law principle is lacking, is misplaced. The district court's opinion, at PA 79, was addressing the "rate" of interest, not the availability of compound interest. Nor do any of the three cases that McKesson then cites, CP 23-24, suggest that federal common law controls because there is no

customary international law rule on the availability of compound interest.[10]

A number of federal cases, applying U.S. or domestic state law, have awarded compound pre-judgment interest. See CP 24, first full paragraph. However, in West Virginia v. United States, 479 U.S. 305 (1987), and General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983), the issue presented was not whether compound prejudgment interest should be awarded but whether prejudgment interest should be awarded at all. The circuit court authorities cited, which include cases from only two circuit courts, are insufficient to establish, as McKesson contends, that "the court [sic] of appeals have developed a rule of federal common law that includes a strong presumption in favor in compound prejudgment interest." Id.

Moreover, only one of the cases cited by McKesson -- Amoco Cadiz – involved foreign parties. The Seventh Circuit there said that "prejudgment interest is an element of damages," and "[r]ules for prejudgment interest therefore usually come from the law defining the elements of damages." Id. at 1233. As McKesson notes, the district court in that case nevertheless applied American law to the French plaintiffs' request for pre-judgment interest, and the court of appeals affirmed, but that

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[10] The first case, Forman v. Korean Air Lines Co., Ltd., 84 F.3d 446, 450 (D.C. 1996), which the district court also cites, PA 79a, addresses the issue whether the proper compound interest rate is the prime rate, not whether there should be compound interest. The next, In the Matter of: Oil Spill by Amoco Cadiz, etc, 954 F.2d 1279, 1333 (7th Cir. 1992), is, at page 1333, addressing the rate of compound interest to be awarded, not the availability of compound interest. The third, Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 950-952 & n. 162 (D.C.Cir. 1984), at the pages cited, addresses whether the court should engage in interest balancing in determining jurisdiction to prescribe anti-trust laws. It does not address interest at all.

was only because the French plaintiffs and Amoco agreed to the application of domestic U.S. law. Id. However, where British law applied to the cause of action, the court of appeals applied British law, which does not allow for compound interest. Id. at 1135-1336. Thus, Amoco Cadiz supports the district court's and the court of appeals' position that customary international law controls the determination whether compound interest should be awarded, rather than, as McKesson argues, federal common law.

We agree that a district court's discretion should be guided by legal principle and that, in reviewing for an abuse of discretion, an appellate court should consider whether the district court failed to consider a relevant factor, relied on an improper factor, or gave reasons that do not reasonably support its decision. See CP 25, first full paragraph. The district court's exercise of discretion on this issue clearly passes these tests.

McKesson has mischaracterized the court of appeals' ruling on the obligation to make plaintiffs whole. The court ruled only that "some federal common-law principles require courts to 'make the plaintiff whole,'" PA 19a, emphasis supplied, not that "federal common-law principles" in general so required or that those principles applied in this case. Contra, CP 26. The negative inference of "some" do is that "some" don't.

McKesson's representations as to how it has been damaged by Iran's claimed expropriation are not convincing. According to McKesson, this Court should view McKesson as not having received $7,000,000 in April, 1982 that it was entitled to receive and should therefore award McKesson interest equivalent to the interest it would have received on $7,000,000 if it had that additional amount of money to invest in the United States. According to McKesson, it "realized annual compound returns on its equity averaging more than

9%." CP 26. This, according to McKesson, justifies an award of compound interest at a similar rate, so that the final judgment against Iran should be raised from $20,000,00 to $36,000,000.

However, considering the theory on which McKesson established the purported expropriation in this case, an award of compound interest would have been unjustified. McKesson was awarded damages for expropriation on the argument that Pak failed, in 1981 and thereafter, to deposit McKesson's dividends in Iranian rials in a bank in Tehran. If the district court was correct that Iran expropriated McKesson's interest in Pak in April, 1982, by refusing to allow Pak to deposit McKesson's dividends in an Iranian bank, it seems unlikely that Iran, if it had overlooked the transfer of the rials to a bank account, would then have exchanged those rials into dollars and have done so at the most favorable rate of exchange. This, however, was the theory upon which the district court awarded compensation for the 1981 and 1982 dividends and determined the rate of exchange. See PA 76a.

A far more likely scenario is that the rials would have sat in the bank account in Tehran, added to annually by Pak, but never moving on to the United States. Iran generally disfavors interest and was unlikely, we submit, to make an exception for McKesson, so McKesson would have received little or no interest on the dividends, much less the 9% compounded it claims to have received in the U.S. The rate of inflation in Iran was extremely high from April, 1982, the date of the supposed expropriation, through May, 2000, the date of the district court's judgment. Roughly speaking we estimate that an Iranian rial purchased between 1% and 5% as many U.S. dollars in May, 2000, as it had in April, 1982, depending on whether one

obtained the favored rate or the market rate.[11] It is unclear that the value of the accumulating dividends in U.S. dollars, had Pak paid them into a bank account, would even reach into the hundreds of thousands of dollars, much less the roughly $27,000,000 that McKesson claims for pre-judgment interest. Contra CP 24, n. 13.

McKesson's statement that Iran has had "unfettered use" of the amount found by the district court, CP 26, is also wrong. McKesson's dividends were credited to McKesson on Pak's books. It may be fairly said that Pak had some use of the money, but it is hard to see how "Iran" had the use of it at all. If the amount of interest to be awarded is to be determined either by the amount that McKesson was actually damaged or the amount by which Iran profited, the amount that should be awarded is far less than the roughly $11,000,000 it has already been awarded as simple interest.

McKesson's argument continues on the assumption that

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[11]The district court set the exchange rate for the 1982 dividend at 84.45 rials per U.S. dollar, P 76a, the official rate provided by the Iranian Central Bank for favored transactions, although Iran had put in evidence that the 1982 market rate was about 350 rials per dollar, JA 958. According to a reliable source, between 1982 and 1997, the average yearly rate of inflation of consumer prices in Iran was about 20%. International Financial Statistics Yearbook, 1998, pp. 124-125. We have been informed but cannot confirm with certainty that, as of May, 2000, the date of the judgment, the official rate was about 1750 rials per dollar and the market about 5 times that. As of July 23, 2002, an internet source reports an "Interbank rate" of 1741.25 rials per U.S. dollar, www.oanda.com.. We have been informed, however, that this is the old favored rate, which has been abolished. We are also informed that the website of the Central Bank of Iran, www.cbi.ir shows only one rate, 7,926 rials per dollar, said to be a market rate. We cannot access the Central Bank site, but Iran's country page at www.imf.org contains documents confirming that now there is only one, market-based rate.

the applicable rule is that the district court should have awarded it compound interest because that was "required" to "make it whole" pursuant to federal common law or the Treaty of Amity. CP 27-28. However, neither of these sources of law "re[illegible] payment of compound interest. The federal common law rule grants the courts discretion. The principle governing this discretion is customary international law, because that is the body of law "defining the elements of damages." See, Amoco Cadiz, supra, at 1233. Customary international law allows compound interest only rarely.[12]

The court of appeals found that the phrases, "just compensation" and "full equivalent" in the Treaty of Amity, on which McKesson relies, CP 27, were "far too ambiguous to require awards of compound interest." PA 17a. In a legal opinion attached by Iran to its reply brief in the court of appeals, Professor Crawford, Special Rapporteur on State Responsibility for the United Nations International Law Committee, gave as his opinion that the Treaty does not even address the question of interest. Crawford Opinion, p. 5. Even if the Treaty did, it should be noted that the Treaty was ratified in 1955. At that time, as McKesson points out, CP 24, 28 U.S.C. §1961(b), the United States statute providing for post-judgment interest awarded only simple interest. As far as we know, Iran's domestic law has never provided for the award of compound interest. Clearly, Iran did not agree in the Treaty to awards of compound interest.

Finally, McKesson argues that it was "improper" to consider how other international tribunals have ruled on this

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[12] Carrying this argument one step further, one could argue that customary international law chooses non-discriminatory Iranian law as the law to be applied. On that argument, McKesson was entitled to no interest at all.

issue. CP 28. McKesson's argument here is that the district court should have followed the rule announced in Dynamics Corp. v. United States, 766 F.2d 518, 520 (Fed. Cir. 1985), and ITT Corp. v. United States, 17 Cl.Ct. 199, 242 (1989), rejecting district court decisions relying on "traditional" and "time-honored" practices. However, in those cases the district courts relied on "traditional" and "time-honored" practices that had been rejected by appellate courts and by the economic consensus prevailing in the United States as to the meaning of "making the plaintiff whole." Neither these authorities, nor this economic consensus, exist in the international economic arena. Contrary authorities and a contrary consensus exist. Crawford Opinion, pp. 5, 7-8, 10-11. In consequence, the district court's reliance on this consensus and these authorities was not only proper, it was "required" in a case brought under customary international law.

CONCLUSION

For the foregoing reasons, McKesson's cross-petition for certiorari should be denied.

Respectfully submitted,

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Dated: July 24, 2002

APPENDIX

APPENDIX

APPENDIX A

MEMO TO PAK'S ACCOUNTS
DEPARTMENT FROM THE MANAGING
DIRECTOR, DATED OCTOBER 31, 1981 ..... 1a

APPENDIX A

Pak Dairy Company

Date: 9.8.1360(31.10.1981)

To: Accounts Department
From: The Managing Director

The company's board of directors in its meeting held on 5.8.60 (27.10.1981) had approved distribution of profits among the shareholders for the previous fiscal year by the last day of the legal time limit, with due consideration to the company's financial resources.

The foreign shareholders' profits will be credited to their account as in the past so that it could be paid to them upon their coming to the company.

Managing Director
Mohammad Reza Khobeyri
(sgd.) 31.10.1981

cc: Internal Audit Department File

(Handwritten marginal note:
Mr. Dadyar,
Please take action.
Share dividend of the shareholders
who did not come last year to
collect their cheque as well as
the dividend of Mr. (illegible) be
transferred to Account No. 2020.
sgd.)

(4)

Supreme Court, U.S.
FILED
AUG 16 2002
OFFICE OF THE CLERK

No. 01-1708

IN THE

Supreme Court of the United States

MCKESSON HBOC, INC., et al.,
Conditional Cross-Petitioners
v.
ISLAMIC REPUBLIC OF IRAN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

McKesson's Reply Memorandum Regarding the Conditional Cross-Petition

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August 16, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

13 pp

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, McKesson HBOC, Inc. states that it is a publicly-owned company. It has no parent and there is no publicly-held company that owns 10 percent or more of McKesson's stock.

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REPLY MEMORANDUM REGARDING THE CONDITIONAL CROSS-PETITION

I. IF THE COURT CHOOSES TO REVIEW THIS CASE AT ALL, IT SHOULD REVIEW ALL OF THE QUESTIONS PRESENTED BY BOTH PARTIES, INCLUDING THOSE RELATING TO SUMMARY JUDGMENT.

The Solicitor General, writing on behalf of the Overseas Private Investment Corporation ("OPIC"), has agreed with McKesson[1/] that Iran's petition for certiorari should be denied. *See* Brief of the Overseas Private Investment Corporation in Opposition ("OPIC Opp.") at 9. The Solicitor General also has agreed with McKesson that if the Court were to grant review of any of the four questions presented by Iran's petition, it also should review the second question presented in McKesson's conditional cross-petition, *i.e.*, the question concerning the lower courts' denial of compound interest. *See id.* at 26.

The Solicitor General also has contended, however, that the Court should review the first question presented in the cross-petition (*i.e.*, the question dealing with the court of appeals' reversal of summary judgment as to liability) only if it grants review on Iran's Question 4. *See* OPIC Opp. at 26-27. The government thus suggests the possibility that this Court might wish to grant review on one or more of Iran's first three issues but not on the summary judgment questions raised in the petition and cross-petition. Such an outcome should be avoided. It would assist neither the parties nor the Court.

1/ "McKesson" refers to the Conditional Cross-Petitioners: McKesson HBOC, Inc., Foremost Tehran, Inc., Foremost Shir, Inc., and Foremost Iran Corporation.

Reviewing the other issues raised by the petition and cross-petition inevitably will require the Court to examine the record of the proceedings below and the facts of the case. Iran's jurisdictional arguments, for example, focus on the place of payment of certain dividends owed to McKesson that Iran has refused to pay for more than twenty years. *See* Pet. at 14-20. These same dividend payments are central to the parties' summary judgment dispute. *See id.* at 20-25; Cross-Pet. at 9-23; *see also* PA 11a-15a.[2/] If the Court decides to address Iran's jurisdictional issues, it necessarily will need to review the very record facts that bear on the court of appeals' summary judgment ruling. In these circumstances, a limited grant of review is not warranted.

That is especially so given the potential of the summary judgment questions to resolve the case in its entirety. For example, if the Court were to grant review only on one or more of Iran's jurisdictional issues, and then affirm the judgment below, the result would be a second trial in the district court, this time on Iran's "come to the company" defense, followed undoubtedly by at least one further appeal and petition for review in this Court. These additional proceedings might become entirely unnecessary, however, if the Court were to grant review of the summary judgment issues as well. In that event, further proceedings could be avoided, despite affirmance of the courts below on all other issues, if the Court were either to reinstate the summary judgment of the district court on the issue of liability, or to reverse both courts below and award summary judgment to Iran. Thus, by reviewing all of the questions presented, if it chooses to review any of them at all, this Court can maximize the efficient use of its resources and minimize the likelihood that another trial will be necessary.

2/ "PA" refers to the appendix to Iran's Petition.

There is still a further reason why granting review only on one or more of Iran's jurisdictional issues would be inadvisable. None of those questions divided the courts below. It was only on the issue of whether McKesson was entitled to summary judgment that the district court and the court of appeals disagreed. In such circumstances, if this Court is inclined to consider any of the issues on which the courts below agreed, it should also address the potentially dispositive question on which they differed.

II. IF THE COURT GRANTS IRAN'S PETITION, IT SHOULD ALSO REVIEW MCKESSON'S COMPOUND INTEREST ISSUE.

A. The Lower Courts' Denial Of Compound Prejudgment Interest Raises Important Issues That Are Closely Related To Those Raised By Iran's Petition.

Iran contends that, even if its petition is granted, the Court should decline to review the compound interest question presented by McKesson. As the government has recognized, however, the compound interest issue depends in part on the source of governing substantive law, and on the appropriate interaction between customary international law and federal law, the very kinds of issues that would be implicated if the Court were to grant review on any of the first three questions presented by Iran. *See* OPIC Opp. at 29. If the Court determines, contrary to our view and the Solicitor General's, that it is necessary to consider any of these issues now, then it also should grant review of the compound interest issue.

This is particularly true in light of the importance of the compound interest issue, not only to this case but to the effective and consistent administration of justice in the federal courts generally. We recognize, as the Solicitor General notes, that the court of appeals' decision leaves this

case at an interlocutory stage and that the compound prejudgment interest issue would be preserved for review at a later date, if necessary. *See* OPIC Opp. at 9, 27. Indeed, it was for this reason that McKesson chose not to seek independent review of the issue at this time. We cannot agree, however, with the Solicitor General's characterization of the issue as an unimportant one. *See id.* at 27.

First, the court of appeals' determination that the district court had acted within its discretion was not, in the Solicitor General's term, "fact-specific." OPIC Opp. at 27. Indeed, that is precisely what was wrong with the decisions by both courts below: they ignored the facts of this case, and focused instead on what other bodies that are not federal courts, applying standards other than federal common law or customary international law, had done in other cases.

Second, as this case illustrates, the difference between compound prejudgment interest and simple prejudgment interest can be immense. The determination of which measure of interest to award, therefore, can have tremendous consequences for litigants in any case that, like this one, is complex and may take years to resolve. The lack of analysis exhibited by the courts below, their confusion concerning the applicable standard, and their ultimate denial of compound prejudgment interest to a plaintiff deprived of its property for more than twenty years by a defendant that has used every procedural device imaginable to delay judgment, sets a terrible precedent and must cause serious concern to any litigant embarking on a suit for damages in the federal courts, particularly one against a foreign state. The issue, therefore, is an important one that warrants independent review by this Court, if not now, then after McKesson has succeeded in having its judgment as to Iran's liability reinstated.

B. Iran's Compound Interest Arguments Relate Only To The Merits Of The Issue And Provide No Basis For Denying Review.

McKesson's argument for review of the compound interest issue consists essentially of five related points:

(1) If there a were a rule of customary international law governing the award of compound prejudgment interest, that rule would apply here;

(2) There is no rule of customary international law governing the award of compound prejudgment interest;

(3) Where, as here, a rule of customary international law is lacking with respect to an issue that otherwise would be governed by customary international law, federal courts must apply federal common law standards;

(4) In exercising their discretion to grant or deny compound prejudgment interest, federal courts should consider what is required to make the plaintiff whole under the facts and circumstances of the case, and compound prejudgment interest is the norm in federal litigation; and

(5) The district court ignored the facts and circumstances of this case in denying compound prejudgment interest, and instead relied entirely on what the Iran-U.S. Claims Tribunal and U.S. Foreign Claims Settlement Commission -- applying different standards, dictated by different circumstances, to cases with different facts -- have traditionally done in denying compound prejudgment interest.

See Cross-Pet. at 23-29. Thus, McKesson argued, the district court's decision, and the court of appeals' opinion affirming

it, ignored well-established principles of federal law on issues of vital importance to civil litigants in a wide range of cases, and thus presented an issue suitable for review by this Court. *See id.*

Iran does not appear to contest McKesson's first point, *i.e.*, that a customary international law rule would govern if such a rule existed. Iran Opp. at 16-17. On the second point, however, Iran asserts that the court of appeals recognized as a "settled principle" of customary international law a statement by Iran's expert, James Crawford, to the effect that compound prejudgment interest should not be awarded absent special circumstances. Iran Opp. at 18. But the court of appeals never said or even suggested that Crawford's view constitutes a "settled principle," much less a rule of customary international law that the district court was obliged to apply. *See* PA 17a-19a. For such a rule to exist, there must be virtual unanimity in the practice of sovereign states. *See The Paquete Habana*, 175 U.S. 677, 700 (1900); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995). Far from recognizing that such unanimity exists, the court of appeals acknowledged that, although the Iran-U.S. Claims Tribunal has never awarded compound interest, other international tribunals have. PA 18a. The court of appeals considered Crawford's view to be that of "most contemporary sources," but the court did not say that that view has been adopted by states to the extent required for a customary international law rule. Mr. Crawford himself plainly did not regard the "special circumstances only" view as a rule of customary international law; he provided Iran with an expert opinion in support of its argument (which the court of appeals rejected) that customary international law *requires* simple interest. *See* Appellant's Reply and Cross Appellee's Brief at 55 & Exh. 1 (Opinion of James Crawford, dated June 11, 2001).

On McKesson's third point, that federal law governs when a customary international law rule is lacking, Iran

merely observes that the cases McKesson cited for this proposition did not involve the availability of compound prejudgment interest. Iran Opp. at 18-19 & n.10. This is true, but irrelevant. The principle for which McKesson cited these cases is one of general application, and is not restricted to instances in which the missing customary international law rule pertains to compound prejudgment interest, or to any other specific issue. Nor is there any basis for treating cases involving compound prejudgment interest any differently, for purposes of determining what law governs, than cases involving any other issue as to which there is no applicable rule of customary international law.[3/]

In response to McKesson's fourth point, Iran complains that McKesson did not cite a sufficient number of cases to support its argument that federal common law includes a strong presumption in favor of compound prejudgment interest. Iran cites no contrary cases, however, and also ignores the fact that McKesson did not cite these cases merely to illustrate the presumption; one of them, as McKesson emphasized, flatly states that "'*compound prejudgment interest is the norm in federal litigation.*'" *See* Cross-Pet. at 24 (quoting *Amoco Cadiz*, 954 F.2d at 1332) (emphasis added). Nor does it matter that, as Iran points out,

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3/ Iran cites *Matter of Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1333 (7th Cir. 1992), for the proposition that customary international law, not federal law, controls because the "'[r]ules for prejudgment interest . . . usually come from the law defining the elements of damages.'" Iran Opp. at 19, 23. Although the Seventh Circuit's observation appears unobjectionable, it provides no help on the issue here, which is what law controls when "the law defining the elements of damages" contains no applicable rule regarding prejudgment interest. This issue was not presented in *Amoco Cadiz*; as Iran itself acknowledges, the court in that case applied British law, which does contain a rule concerning the availability of compound prejudgment interest. 954 F.2d at 1135-36.

only one of the cited cases "involved foreign parties." Iran Opp. at 19. The nationality of the parties is irrelevant to the principle for which McKesson cited these cases: that federal common law contains a presumption in favor of compound prejudgment interest.

Iran disputes McKesson's view that the proper exercise of discretion on the issue of compound interest requires federal courts to consider what is required to make the plaintiff whole under the facts and circumstances of the case. Iran makes too much of the court of appeals' comment that "some" federal common law principles require courts to make the plaintiff whole. Iran Opp. at 20. The court's use of the word "some" does not imply, as Iran asserts, that there must be other federal common law principles that look in the opposite direction. Rather, it reflects only the obvious fact that not all federal common law principles have any bearing on the subject of making plaintiffs whole. Iran has not even suggested, much less identified, any legal principles at all, federal or otherwise, that counsel against making plaintiffs whole.

On McKesson's fifth point, finally, Iran says that the district court's reliance on the "consensus" in international law against compound interest was "not only proper," but was "'required'" here because the case was brought under customary international law. Iran Opp. at 24. As the court of appeals recognized, however, there is no "consensus" in customary international law against compound interest; that is why there is no customary international law rule requiring simple interest. *See* PA 17a-18a. Because there is no customary international law rule, federal law governs; with respect to the compound interest issue, the fact that the case was brought under international law is relevant only to the academic question of what law would apply in the hypothetical event that a customary international law rule existed.

CONCLUSION

If the Court grants Iran's petition for a writ of certiorari, the conditional cross-petition also should be granted.

Respectfully submitted,

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August 16, 2002